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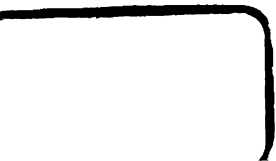
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JSN
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TAM

Vol

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THE

ECCLESIASTICAL AND ADMIRALTY REPORTS;

BEING

REPORTS OF CASES

HEARD BEFORE

**The Arches and Prerogative Courts of Canterbury and the
Consistory Court of London**

RESPECTIVELY,

**THE HIGH COURT OF ADMIRALTY AND THE
ADMIRALTY PRIZE COURT,**

TOGETHER WITH

**SUCH CASES AS HAVE BEEN CARRIED BY APPEAL FROM THOSE COURTS RESPECTIVELY
TO THE PRIVY COUNCIL**

VOL. I.

**EASTER TERM 1853, TO MICHAELMAS TERM 1854,
16 & 17 VICT., and 17 & 18 VICT.**

BY

THOMAS SPINKS, D.C.L.

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JUDGES AND LAW OFFICERS.

THE ARCHES COURT OF CANTERBURY AND THE PREROGATIVE COURT OF CANTERBURY.

The Right Honourable Sir JOHN DODSON, Knt. D.C.L.

CONSISTORY COURT OF LONDON.

The Right Honourable STEPHEN LUSHINGTON, D.C.L.

THE HIGH COURT OF ADMIRALTY AND THE ADMIRALTY PRIZE COURT.

The Right Honourable STEPHEN LUSHINGTON, D.C.L.

THE QUEEN'S ADVOCATE.

Sir JOHN DORNEY HARDING, D.C.L.

THE ADMIRALTY ADVOCATE.

JOSEPH PHILLIMORE, D.C.L.



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THE

ECCLESIASTICAL AND ADMIRALTY

REPORTS,

1853.

IN THE GOODS OF WILLIAM SIMKIN,
DECEASED.

1853.
PREROGATIVE
COURT OF
CANTERBURY.

May 6.

WILLIAM SIMKIN died on the 20th July, 1847, leaving a will, dated 25th January, 1837, in which there were various alterations and interlineations. Both the will and alterations were in the handwriting of the deceased. No evidence could be obtained as to the time when the alterations were made. The will was found locked up in a bureau, the key of which was in the possession of the deceased.

Alterations in a will or codicil, bearing date in January, 1837, presumed to have been made prior to Jan. 1. 1838.

Statement.

Argument.

Dr. Jenner moved the Court to grant probate of the will as it was found, with the alterations. He submitted that the presumption of law respecting alterations laid down by the Superior Court, in *Cooper v. Bocket* (a), did not apply here. The will was made before the Wills Act came into operation, and there was no reason to presume that the alterations were not made during the same year.

SIR JOHN DODSON. Before the 1st January, 1838, these alterations would have been entitled to probate. In the absence of evidence I apprehend that the general presumption of *omnia rite esse acta* must prevail; and we must conclude that these al-

Judgment.

(a) 4 Notes of Cases, 688.; S. C. 4 Moore, P. C. C. 419.

1853.

terations were made by the testator before that period. I therefore, decree probate of the will, with the alterations. (a)
Proctor, *Jellicoe*.

PREROGATIVE
COURT OF
CANTERBURY.

May 6.

Signature of
testator in the
testimonium
clause, not evi-
dently intended
for his final
signature.
Probate
granted on
consent.

Statement.

IN THE GOODS OF RICHARD DINMORE, DECEASED.

RICHARD DINMORE died on the 9th of April last, leaving personal property, under the value of 800*l*. The only testamentary paper found was one bearing date 1st September, 1842, in which his wife was appointed sole executrix and universal legatee.

This paper ended, "In witness whereof I, Richard Dinmore, have hereunto set my hand and seal, this first day of September, one thousand eight hundred and forty-two." There was no other signature of the testator, and no seal. There were three attesting witnesses; one of whom made an affidavit to the effect, "that the deceased had asked him to come and attest his will; that the deceased produced the will to him and his fellow-witnesses, with his name already signed in the testimonium clause; but made no further acknowledgment of such his signature; that such signature, as well as the rest of the will, were in the handwriting of the deceased."

Argument.

Counsel, in moving for probate, submitted, 1st, That such signature was declared sufficient, by 15 & 16 Vict. c. 24. s. 2., which provided that no will should be deemed invalid by reason of the signature of the testator being placed in the testimonium clause; and, 2ndly, That the signature was sufficiently acknowledged; and cited the cases of *Keigwin v. Keigwin* (b), *Anne Ashmore* (c), *Giles Davis* (d); and, 3rdly, That the words "and seal" were mere surplusage, as the act required no seal.

Judgment.

SIR JOHN DODSON. I should, perhaps, not have hesitated to pronounce both the signature and the acknowledgment sufficient, if the testator had omitted the words "and seal." These words induce the belief that the testator did not intend the name in the testimonium clause for his signature, but purposed adding another signature, together with his seal. The act requires that

(a) In *Pechell v. Jenkinson*, 2 Curt. 273., Sir H. J. Fust decreed probate of an unattested codicil on the same principle. The will was dated in 1830, the codicil had no

date, and the testatrix died 20th January, 1839.

(b) 3 Curt. 610.

(c) 3 Curt. 758.

(d) 3 Curt. 748.

it shall be apparent on the face of the will that the testator intended the name for his signature. I have some doubt of its being so in the present case. Let the case stand over, that inquiries may be made respecting the parties entitled in distribution, and whether they will consent.

1853.
IN THE GOODS
OF RICHARD
DINMORE,
DECEASED.
Judgment.

May 14.

On the following court-day proxies of consent were brought in from a son and daughter of the deceased; but it appeared that there were some minor children of a deceased son of the testator.

Counsel again moved the Court to grant probate of the will; and cited, as analogous, the case of *Francis Lamb (a)*, in which Sir *Herbert Jenner Fust* decreed probate of a will, of which he had doubts, upon similar consent, notwithstanding there were minors entitled in distribution.

SIR JOHN DODSON. I am unwilling to put the parties to the expense of propounding the paper as the property is so small. I decree probate of the paper.

Proctors, *J. R. & G. Burchett.*

IN THE GOODS OF THE REVEREND JOHN HEWLETT, CLERK, DECEASED.

PREROGATIVE
COURT OF
CANTERBURY.
May 14.

NATHANIEL HEWLETT died in December, 1830, a widower, without (as was presumed) any issue; but leaving his brother and sister, the Rev. John Hewlett, and Mary, wife of William Watson, his only next of kin.

Unpublished
depositions
cannot be given
out of the cus-
tody of the
Court, nor
copies thereof
be taken.
Statement.

A suit was afterwards commenced in this court by Edward Wood, as guardian of his wife Emma Wood, an alleged granddaughter of the deceased. An allegation was given in, and witnesses were examined; but before publication the suit was compounded between the parties, and letters of administration were granted to Mrs. Watson, the deceased's sister; and a release was executed between the parties, which would be a bar to any further proceedings being afterwards taken here.

The deceased's brother, the said Rev. John Hewlett, also died, and a suit was instituted in the Court of Chancery for the administration of his affairs, entitled *Cooper v. Everett*, in which it was necessary to ascertain who was at his death the heir-at-law of the Rev. John Hewlett; and, by direction of the master to whom such cause was referred, an application was made to

1853.

IN THE GOODS
OF THE REV.
JOHN HEW-
LETT, CLERK,
DECEASED.
Statement.

this Court on the 10th March last, to allow the depositions taken here in the suit of *Wood v. Watson* to be attended with before the master in the reference in the suit of *Cooper v. Everett*; application the Court then granted.

Accordingly, upon the 21st April last, the officer of this Court attended before Master *Humphrey* with the original depositions, under instructions from the registry that the said master might open them for his own use on such reference; but that the same were not to be used by the parties in the suit, and that he, the said officer, should wait and take back the evidence resealed by the master.

The said master read a portion of this evidence, and stated, that as it was long, and he had to make a report thereon to the Court, he could not do so effectually, unless the original evidence, or an official copy of it, was deposited with him during such reference; and he, therefore, directed that a further application should be made to this Court to permit either such original depositions, or an official copy, to be deposited with him, pending the reference before him.

Dr. Deane now moved the Court accordingly.

Judgment.

SIR JOHN DODSON. The master in the Court of Chancery is desirous of having the original depositions taken in this court, in the suit of *Wood v. Watson*, deposited with him. These depositions were never published; and I apprehend, that however much I might desire to comply with the master's wishes, I am precluded from doing so by the rules of this Court. In permitting them to be attended with for his inspection, I have gone to the utmost length that either justice to the party concerned, or the rules of this court, will allow. I have been informed too, that, under the new rules of the Court of Chancery there is no necessity for the course adopted; but if there were, I am not prepared to admit that, on that account, this Court can be called upon to depart from its own rules. I cannot extend the order. The officer may attend with the depositions as before.

Proctor, Tatham.

1853.

THE CON-
SISTORY COURT
OF LONDON.

May 17.

Proceedings in
a suit for an
inventory and
account stayed
until the result
of proceedings
in the Court of
Chancery for
the administra-
tion of the
estate are
known.

Statement.

BROADWOOD v. HOLLAND.

MATTHEW BROADWOOD, late of Oxendon Street, Haymarket, died in the month of September, 1840, intestate, leaving Charlotte Broadwood, his widow and relict, and two minor children, David and Frederick. In the month of October, 1840, letters of administration were granted to the widow. She afterwards married, and again became a widow. On the 29th June, 1852, David Broadwood, the only then surviving son, took out a citation under seal of this court, calling upon the administratrix Charlotte Holland, formerly Broadwood, to exhibit an inventory and account. On the 17th November she appeared personally, and was assigned to exhibit the same on the next court-day. The cause then stood over until the 18th January, 1853, when the judge, Dr. *Lushington*, at the petition of the proctor, pronounced her in contempt for not having exhibited the inventory and account as assigned, directed such contempt to be signified, and, on the further petition of the proctor, gave leave for the administration bond to be attended with and produced on the same being sued for at common law. On the following day, January 19th, Mrs. Holland appeared before a surrogate took the usual oath, and was absolved from her contempt. A proctor then appeared for Mrs. Holland, and brought in an inventory and account duly sworn to by her. On the following court-day, 26th January, the Court was moved to rescind so much of the order of the 18th January, as directed the administration bond to be delivered out of the registry and produced, on the same being sued upon at common law. The Court refused to *rescind* the same, on the ground that such a course would imply error on the part of the Court in having made such order; whereas, in fact, at the time of making the order, there was a clear breach of the bond in the non-delivery of the inventory. But such inventory having been brought in on the following day, and the ground of the order being thereby removed, the Court directed the said order to be *suspended*. On the 4th sess. of Hilary Term, the 10th February, the proctor of David Broadwood declared he objected to the inventory and account, prayed to be heard on his petition, and was assigned to deliver his Act to Mrs. Holland's proctor upon the bye-day. This assignation was continued until the 2nd sess. of Easter Term, 29th April, when, upon Broadwood's proctor praying further time, on the ground that proceedings were pending in Chancery, counsel

1863.
BROADWOOD
v.
HOLLAND.
Statement.

appeared for Mrs. Holland and said, that that was a sufficient ground for her dismissal from the suit in this court, and moved the Court accordingly.

The judge complained that no notice of this motion had been given, and no papers had been sent to him, and directed the matter to stand over.

Affidavits made by the solicitors concerned for the parties in the suit in Chancery, were brought in on both sides. From these it appeared, that David Broadwood filed a claim for the administration of his father's estate against Mrs. Holland the administratrix, on the 22nd June, 1852, seven days before he cited her in the Consistory Court; that it had been referred; that the master had taken the accounts, and was nearly ready to make his report thereon; and further, that the parties to the suit in the Court of Chancery were identical with the parties to the suit in this court.

Argument.

Counsel now moved the Court to dismiss Mrs. Holland from this suit. The maxim of law, *nemo debet bis vexari*, fairly applied. That it is not applicable merely to a *res judicata* is shown by the fact, that the courts of common law will interfere sometimes to stay proceedings in ejectment, as in the case of *Doe & Pultney v. Freeman*, before Lord *Kenyon*. (a) The consolidation of actions proceeds upon the same principle. It has been recognised, too, in the ecclesiastical courts. In *Brotherton v. Hellier* (b) Sir *George Lee* said, "In the case of a creditor, or next of kin, who files a bill in Chancery and prays an inventory there, the Court will oblige him to make his option which court he will proceed in; because it is unjust that the executor or administrator should be harrassed in both courts by the same person for the same thing." So in *Pearson v. Gamon* (c), and in *Middleton v. Rushout*. (d) Mrs. Holland might have appeared under protest, but was at that time *inops consilii*. As soon as her proctor discovered that the suit was pending in the Court of Chancery, the application was made for her dismissal from the suit in this court. The question of the bond is entirely distinct; that is between other parties. The order respecting it has been suspended. The sureties would probably have a good answer when called upon to show cause why the bond should not be given out for the purpose of being sued upon at common law.

Dr. *Jenner* opposed. The cases cited are not authorities to bind the Court, but merely *obiter dicta*. The real question at

(a) Cited 2 Sellon's Pract. 144.

(b) 2 Cas. temp. Lee, 134.

(c) 2 Cas. temp. Lee, 269.

(d) 1 Phillim. 247.

issue is the administration bond. The affidavits show there has been mal-administration of the estate; the administratrix is in poor circumstances, and unable to pay the parties entitled in distribution; their only remedy, therefore, is against the sureties. This remedy would be taken away if Mrs. Holland were to be dismissed from the suit.

1853.
BROADWOOD
v.
HOLLAND.
Statement.

DR. LUSHINGTON. This is an application made on the part of the widow, who is the administratrix in the case, that she may be dismissed from the proceedings which have been instituted against her. This is opposed on behalf of the son, who is entitled to part of the property, his father having died intestate; and the prayer on behalf of the son is, that the Court will not dismiss, as I understand, the sureties in the administration bond from any observance of justice to be enforced in this court.

Judgment.
May 17.

Now, all the parties have grievously mistaken their way in this case — grievously so. The first proceeding in this court bore date on the 29th of June in last year; and, as I understand, proceedings had already been commenced in Chancery on the 22nd of June.

Now, supposing the party was aware of these proceedings in Chancery, it was a deception on the Court to have allowed the proceedings to take place here without that being communicated to the Court. Whatever the effect might be which the Court would have attributed to that suit, it was clearly a matter which ought to have been made known to the Court, for it to exercise its own judgment upon. Instead of that the Court is unfortunately left in ignorance of the proceedings till a late period, till the cause had gone on; and the Court, according to the ordinary course of proceeding, had no option but to pronounce Mrs. Holland in contempt, which it never would have done, or thought of doing, had it been intimated that there were proceedings in the Court of Chancery for the purpose of obtaining a due administration of this estate.

When proceedings have been commenced in the Court of Chancery, the proctor is not justified in concealing that fact from the Court.

However, so it was; and on the 18th of January, 1853, I did, at the prayer of the party, cause this contempt to be signified, and gave leave for the administration bond to be produced on the same being sued for at common law.

Now, it is very true that Mrs. Holland was equally to blame in not making known to the Court — not having appeared — that such proceedings were instituted against her. If she had appeared and stated the fact, the Court would have held its hand. It is equally clear, supposing the proctor for Mr. Broadwood to be aware of the proceedings in Chancery, that the decree was obtained behind the back of the Court, if I may

1853.
 BROADWOOD
 v.
 HOLLAND.
Judgment.

use the expression, because it was in ignorance of what it was doing.

The course the Court would have taken, if it had been apprised of all these facts, would have been as plain as it is possible to be. It would have said on the party being cited, and being informed of the proceedings, "I hold my hand till the result is known of what has taken place in Chancery;" then if it had turned out that there was a decree against the party proceeded against in this court and in Chancery, and that that decree could not be enforced without its aid and assistance, certainly then the Court would have afforded its aid and assistance. That would have been the state of the case instead of the Court doing what now unfortunately and unwittingly it has done.

It appears that, on the 19th of January, Mrs. Holland took the usual oath; she was absolved from her contempt; then she appeared by a proctor, and then for the first time the Court was apprised of all these circumstances.

The course I have now to pursue is equally clear. I shall not dismiss Mrs. Holland, unquestionably. The plea of *alibi pendens*, which in substance is intended to be set up, does not apply to this proceeding, and cannot, so far as relates to the bond being attended with. Of course it applies to the inventory and account; that is, the administration of the estate. That suit is going on in Chancery, and the Court would never pretend to exercise its limited power for the purpose of ascertaining whether she is really a debtor to the estate or not. But I shall not dismiss this suit altogether for this reason,—if it should turn out that in the Court of Chancery the decree passes against her, that she does not or cannot comply with that decree, then I must hold the power and authority in my hand, if the Court of Chancery should direct it, of ordering the bond to be attended with in the Court of Chancery, or a court of common law. And be it observed, that this is not the first time when, at the instigation of the court of equity, the bond has been directed to be attended with in a court of equity or common law.

What I shall do is, to stay all these proceedings till those in Chancery are known; and, upon their being known, at the instigation of that Court—not at the suitor, I do not bind myself to that,—the Court will adopt those measures best calculated to do substantial justice in the case.

1853.

IN THE MATTER OF THE WILL OF THE LATE
NAPOLEON BONAPARTE.PREROGATIVE
COURT OF
CANTERBURY.

Feb. 17.

NAPOLEON BONAPARTE died on the island of St. Helena on the 5th May, 1821, leaving property under the value of 600*l.* within the province of Canterbury. His will with seven codicils, which had been proved in this Court in August, 1824, by one of the executors Charles, Count de Montholon, had remained in the registry up to the present time. A proxy of consent had been executed by the Count de Montholon, and an affidavit of Lord John Russell brought in, to the effect, "that an application had been made by the French government to the government of her Majesty, for the original will of the late Napoleon Bonaparte, now deposited in the registry of this court, to be delivered over to the French government; that her Majesty's government considered it advisable, on grounds of public policy, that such application should be complied with, and that the will should be delivered out of the registry to her Majesty's principal secretary of state for foreign affairs, in order that the same might be by him forthwith delivered over to the French government accordingly." There was also an affidavit from the solicitor, who had acted in administering the estate, to show that no one would be prejudiced by the motion.

An original will, deposited in the registry of the Prerogative Court of Canterbury, can only be delivered out for the purpose of being given into the custody of the legal authorities of some other country, and *that* upon good cause shown.

Statement.

The Queen's Advocate (Sir *J. D. Harding*) now moved the Court, on these grounds, to decree the will and codicils to be delivered out of the registry to her Majesty's principal secretary of state for foreign affairs, in order to be delivered over to the French government. He cited as precedents, the cases of *Mary Renton*, 19th May, 1791 (*a*), *Duncan Forbes*, 23rd November, 1792 (*a*), and *Sir Herbert Taylor*, 4th July, 1839. (*a*)

Argument.

SIR JOHN DODSON. This is an application at the instance of the lords commissioners of the treasury, that the will and seven codicils of the late Napoleon Bonaparte may be delivered out of the registry of this court to her Majesty's principal secretary of state, for the purpose of their being given up to the French government. The ground on which the application is made is that of public policy. That is the reason assigned in the affidavit of Lord John Russell, and it has been relied upon in a great measure by the learned counsel who makes the

Judgment.

1853.
 IN THE
 MATTER OF
 THE WILL OF
 THE LATE
 NAPOLEON
 BONAPARTE.
Judgment.

motion, and who stated that it was sufficient of itself to induce the Court to grant the prayer. But I apprehend that it is by no means sufficient to state that the proposed measure will be advantageous in point of public policy; it is further necessary to show, and the learned counsel seemed to feel it, that the step proposed to be taken is conformable to law and comes within the authority of the Court. Undoubtedly this Court, like other Courts, would be most desirous to carry into effect the views of her Majesty's government; but however desirous it may be to do so, it cannot venture to go beyond the limits of legal authority. In a country governed by law, it is necessary that the Court should look to the law of the country and not to the will and desire of the government. For instance, in the Prize Court of Admiralty it was by no means unusual for the Crown to send down an order that a vessel seized as a prize of war should be delivered up, and the Court obeyed it, unless there had been a final decree condemning the ship and cargo to the captor. When that has been the case, the Crown has no longer power to release it; the property becomes vested in the captor. (a) Until that sentence has passed, it is the property of the Crown; consequently the Crown has the power of delivering it up, but after that period it has not. In this case the learned Queen's Advocate has pointed out to the Court, not only that this motion is consonant with the views of her Majesty's government, but has also cited cases to show that it is within the power of the Court to order the will and codicils to be delivered out of the registry for the purposes he has mentioned. The first case cited was that of *Mary Renton*, which occurred in 1791. In that case the will was proved here, and ordered to be transmitted to Edinburgh to be there deposited in the proper office for the registry of wills. But it was necessary for legal purposes, that the will should be sent to Edinburgh, because it was stated that it was impossible to make a title to some property unless the original will was transmitted there. I col-

(a) In the case of the "*Elsebe*" (5 C. Rob. 173.), Lord *Stowell* delivered an elaborate judgment upon this point. The government had ordered the release of several vessels, being part of a *Swedish* convoy, under particular circumstances. The question made on the part of the captors was, whether the Crown had such a power, or rather whether a right and interest in the thing taken did not vest in the captor at the time of seizure, under the grant of prize made to captors by the order

of council, the proclamation, and the Prize Act, in such a manner as to entitle the captor to proceed to adjudication, notwithstanding an order of release on the part of government. Lord *Stowell* concluded his judgment in these words, "On the whole case I am of opinion that all principles of law, all forms of law, all considerations of public policy, concur to support the right of release prior to adjudication, which I must pronounce to be still inherent in the Crown."

lect from that case, that the party was a domiciled Scotch subject, though the will had been proved in Doctors' Commons. The Court thought itself competent to make the order, and it accordingly decreed the will to be delivered out of the registry of the Court, for the purpose of its being deposited in the registry of the proper court for the custody of wills at Edinburgh.

The next case mentioned was, that of *Mr. Duncan Forbes*, which occurred in 1792. In that case the will was ordered to be delivered out of the registry for the purpose of its being placed in proper custody in the island of Grenada. But it there appeared, that the will had been originally proved in that island, where the testator died; it was then sent over and proved here, and the Court directed it to be returned to Grenada. That case, for the reasons I have stated, is not very similar to the present. The last case cited, that of *Sir Herbert Taylor*, seems to have a much more direct bearing on the question before the Court. That occurred in 1839. It appeared that Sir H. Taylor had made a codicil to his will at Rome; that codicil was proved in London, and was afterwards ordered to be delivered out for the purpose of being given to the legal authority for the proper custody of wills in that country. That seemed to approach more nearly to the present case than either of the others mentioned by the Queen's Advocate. Upon consideration of the matter, I think there is sufficient to justify the Court in complying with the prayer that has been made, but not exactly in the terms in which it was couched. That I cannot do. I am at liberty to follow the course pursued in the case of *Sir Herbert Taylor*, in which the Court directed that the codicil should be delivered out for the purpose of its being recorded or filed in the proper court, or deposited with the legal authorities, a notarial copy of the will being left in the registry of this court. Here I may decree the will and codicils to be delivered out, not for the purpose of their being delivered to the French government, because I apprehend I cannot do that; but I can order them to be delivered out for the purpose of being sent to and being put into the custody of the legal authorities in France, or to be recorded in the proper place there. I shall accordingly direct the registrar to attend on the secretary of state, and deliver the original will and codicils to him, notarial copies having been first made, and to take his receipt for them. It must be understood that they are to be delivered over to the secretary of state for foreign affairs, for the purpose of being delivered by him to the legal authorities in France.

The Queen's Proctor.

1853.
 IN THE
 MATTER OF
 THE WILL OF
 THE LATE
 NAPOLEON
 BONAPARTE.
Judgment.

1853.

CONSISTORY
COURT OF —

April 21.

Marriage declared null and void by reason of the husband's impotence, notwithstanding there had not been triennial cohabitation, and there was no visible defect. Costs against the husband.

Judgment.

A. FALSELY CALLED B. *against* B. (a)

THE facts of this case will sufficiently appear from the judgment.

DR. LUSHINGTON. This is a suit brought by A. against B., to whom it is admitted she was married in 1848, and she prays the Court to pronounce such marriage to be null and void by reason of B.'s alleged impotency.

The parties separated in 1850, so that the cohabitation lasted only two years and some months. The suit was brought early in the year 1851. The man was about forty-five, and the woman about thirty years old at the time of the marriage. The libel is in the usual form.

Before I consider whether any and what legal consequences result from the cohabitation, either as regards the period during which it continued, or the circumstances attendant upon it, I will direct my attention to the two main issues — whether any incapacity exist in the woman, and the impotency of the man, and the evidence to prove it.

With regard to the first issue, the affirmative of her own fitness, necessarily pleaded by the woman, is contradicted in the plea and in the answers; and the man imputes to her either natural or supervenient incapacity. The report of the medical men states that she is a virgin, and that no impediment exists on her part; and this opinion they assert in very strong terms, having examined her with reference to the defect imputed. There is no opposing evidence worth consideration. I conclude, therefore, that she is a virgin, and capable of consummation.

With respect to the second issue, I must weigh the evidence with due consideration of the two facts which I hold to be proved, and which I have just mentioned. The primary evidence is the report, and from that I conclude that there was no defect whence impotency could be inferred visible on inspection. The evidence of the medical witnesses in the first part of the report is to the effect *that there is apparent capacity, or rather no apparent incapacity*, in the man. Then follows the most important and, as I think, the most difficult part of this report. It is in these words, "*that from his failure to accomplish sexual intercourse during a long period of cohabitation, we believe the said B. to be*

(a) This case was heard *in camera*, but its importance requires it to be reported. For obvious reasons the names of the parties, as well as such circumstances as might identify

them, are omitted. The Queen's Advocate (Sir J. D. Harding), Dr. Addams, Dr. Bayford, and Dr. Twiss appeared for the respective parties.

impotent as regards the said A., and that such impotency cannot be removed by art or skill." Some discussion took place at the bar as to the meaning of this paragraph, whether the inspectors meant to say that the man was incompetent with respect to all women, or only with respect to this one. I must say I never entertained any doubt as to the true construction of this part of the report; but, *ex majori cauteld*, I desired a communication to be made through the registrar to one of the inspectors for an explanation. That explanation was made known to the proctors on both sides; it accords with what I conceive to be the plain meaning of the words, that the inspectors said and intended to say only that B. was incompetent *quoad hanc*.

Let me consider the effect of this restricted meaning, whether the report could have been, or, in order to influence the judgment of the Court, ought to have been, comprised in terms which would have included the whole female sex. If the inspectors, upon examination, discover apparent impotency, that is, natural defects or injuries, the result of which their medical skill enables them to estimate, they may of course certify to impotency as to all women; but where there is no defect or injury apparent, what means have they of judging of impotency at all? I apprehend the primary ground of their judgment must be non-consummation after cohabitation for a long period of time, and no further or other assistance can they have, save that they may have been accustomed to advise in similar cases, and so have gained a species of experience, not of fact but of inference from fact. How under these circumstances do the *media concludendi* and the means of forming a judgment, possessed by these medical gentlemen, with regard to this latter paragraph, differ from the means possessed by the Court or any other person? In no other respect, I apprehend, than in the opportunity of frequently or more frequently having to consider circumstances of this description. The main ground of conclusion is non-consummation after long cohabitation. Why is such non-consummation evidence of impotency at all? Because, according to the ordinary course of nature, consummation does take place where persons both competent cohabit together. When therefore, after such cohabitation, the wife is found to be a virgin, and capable of consummation, the absence of consummation must necessarily be attributed to the apparent or non-discoverable impotence of the man.

All that I have now said is consistent with the known rule of law on this subject, which rule of law is founded upon sound principles of reason. But the report in this case narrows the averment of impotence to *quoad hanc*. Does the rule of law do more, or can it do more?

1853.
A. FALSELY
CALLED B.
against B.
Judgment.
Medical certi-
ficate of hus-
band's impo-
tency *quoad*
hanc, sufficient.

1853.

A. FALSELY
CALLED B.
against B.
Judgment.

The rule of law
is no more than
a presumption
of universal
from proof of a
particular im-
potence.

This rule of law and the report necessarily go on the same grounds and no other—non-consummation after opportunity. Who by possibility can say that such a man is necessarily impotent as to all women? It may be so, or it may not. There is no evidence to establish the affirmative. The utmost that can be said is, that a man impotent *quoad hanc*, would be impotent as to all. This, however, is inference, and not proof.

I abstain from entering into further useless speculation upon the subject. I think the report does go the whole length that the inspectors were justified in going. If I should be threatened with the danger of the man marrying again and having children, the answer is that the rule of law to which I have adverted does not and cannot provide against such danger. For the Court will not adopt the doctrine of the nullity of such second marriage by reason of the Church having been deceived. (a) I will add one observation before I leave this part of the case, an observation, indeed, apparent to all, that impotency *quoad hanc* is just as prejudicial to the individual woman as universal impotency.

I come then to the conclusion, that I am upon this ground justified in pronouncing this marriage to be null and void unless I am prohibited from so doing by some countervailing rule. The ordinary rule is, that there must have been a triennial cohabitation. After a triennial cohabitation without consummation, the law presumes impotence, though no defect be apparent; whether impotence universally, or impotence *quoad hanc*, the law says nothing, and can say nothing. In the present case the parties lived together for more than two years; but, within the words of the rule, the case certainly does not come. What, however, are the principles upon which this rule is founded? That there should be a cohabitation of so long a period, that if the man were potent and in good health, no temporary impediment could have prevented consummation, according to all the reasoning and experience which the subject admits of. By temporary impediment in such a case, I mean, nervous feeling on the part of the man, or resistance from fear on the part of the woman. Both causes preventing consummation, yet both causes incap-

After a triennial cohabitation without consummation, the law presumes impotence.

(a) In *Welde v. Welde*, 2 Lee, 586., the Court is reported to have said, "If the parties should be divorced, and both should marry again, and he should have children by the second marriage, these second marriages must be by law set aside and the first marriage declared valid; for when the Church appears to have been deceived, the sentence must be revoked." Dec. lib. iv. tit. 15. c. 6.

But in *Bury's case* (5 Rep. 98 b.), children born in such second marriage were adjudged legitimate, on the ground that, even admitting the second marriage to be voidable, yet it remains a marriage until it be dissolved, &c. Dr. Lushington, however, seems to intimate an opinion that such second marriage would not be deemed voidable.

able of proof except by the testimony of the parties themselves. If such causes exist, no man can judge of the duration of such causes; there is no sound reason why they should terminate at the expiration of any particular period. The rule is founded on probability alone. The man may be incapable up to the moment when the three years have expired, and then capable; the law cannot meet all possibilities.

The duration of three years then does not mean lapse of time alone, but lapse of time combined with facility for consummation. Within certain bounds this facility must differ in all cases. Seldom, if ever, in cases of this description, do the parties sleep together constantly for the three years, nor has such strictness ever been required in any case to my knowledge. Time alone, even if three or more years, would not be sufficient unless there was also adequate facility for consummation, neither would facility for consummation, unless of duration to overcome temporary impediments. This, unless my judgment deceives me, is the true principle on which the rule depends.

I will now consider what, with reference to the circumstances of this case, are the decrees which the Court might pronounce. First, I might dismiss B. on the ground that A.'s case was not proved according to the strict rules of law. Secondly, I might, according to *Welde v. Welde* (a), direct A. to return to cohabitation. Thirdly, I might pronounce that the marriage was null and void.

As to the first, looking at the evidence in this case, and even at the precedent in 2 Lee as to this point, I could not adopt it unless I were of opinion that the law imperatively compelled me so to do, or in other words that a triennial cohabitation was not only indispensable to a sentence in favour of the wife, but that without it the husband was entitled to be dismissed.

The second course I must follow, should I be of opinion that the rule of triennial cohabitation is absolutely binding. It must be admitted that such is the general rule in cases of non-apparent impotency. In *Lewis v. Lewis* (b), cited in *Welde v. Welde*, the rule was enforced. In *Welde v. Welde* the parties had been married more than three years, but a great part of that time had lived separate, and further cohabitation was inferred. That is the spirit of the rule and not the letter. In *Greenstreet v. Cumyns* (c), the libel alleged that the husband's impotency was apparent; but this was disproved by the medical evidence, and he was found impotent on his own admission. Lord Stowell pronounced the marriage void, though only of two years' dura-

1853.

A. FALSELY
CALLED B.
against B.
Judgment.

The rule
founded upon
probability
alone, requires
lapse of time
combined with
facility for
consumma-
tion.

The Court is
not bound to
adopt the letter
rather than the
spirit of the
rule.

(a) 2 Lee, 586. Before Dr. *Betsworth*, in the Arches, in the year 1731.

(b) Before Sir *John Cooke*, in the Arches, in 1702.

(c) 2 Phillim. 10.

1853.

A. FALSELY
CALLED B.
against B.
Judgment.

No fixed period
of cohabitation
in Scotland.

Circumstances
may justify de-
parture from
the strictness
of the rule.

tion. That was clearly a case of latent impotency, yet the Court thought it was not bound by the rule of triennial cohabitation. In Scotland there is no fixed period for cohabitation. In former times, indeed, it was three years; but the courts now require that that shall be a sufficient cohabitation, according to the circumstances, to test the impotency. In *Sparrow v. Harrison* (a), actual cohabitation was not so long as in the present case, but the Judicial Committee pronounced for the nullity. The marriage had taken place seven years before the separation, but it is not the period of marriage, but of cohabitation, to which this Court must look.

But admitting the general rule, are there not circumstances which would justify the Court in departing from the letter of the rule? I think there may be such, provided the actual cohabitation has been sufficiently long, together with the evidence to satisfy the Court that the powers of the husband have been fully tried. The health of the wife may render such further cohabitation dangerous to life, and the parties may be so alienated that the attempt would be wholly futile.

Here I have the evidence of a medical man that A.'s health is already seriously impaired by distress of mind. Since the middle of 1850, the parties have *de facto* been separated. I do not inquire who is to blame; it is the fact only to which I advert. I think that to compel this lady to return to cohabitation would not only be a useless, but might be a mischievous application of a technical rule, which in its spirit does not in my opinion apply to this case. I think I have no right to expose this lady to the humiliation, and probable injury to her health, which might be the effect of a further cohabitation. I therefore pronounce for the nullity, and the costs must follow the decree. (b)

Proctors for the wife, *Fox, Nicholl & Fox*; for the husband, *Abbot*.

(a) 3 Curt. 16.

(b) In *Lewis v. Lewis* a libel, in which no visible defect was laid, was rejected on the ground that it was given in before the three years were expired. In *Welde v. Welde*, the parties had been married, but had not continuously cohabited for three years. But the husband denied his impotence, and the report of the medical inspectors supported his denial. In *Greenstreet v. Cumyns*, the parties had been married somewhat more than two years, yet the husband in his answers admitted his impotency, and the report of the medical inspectors confirmed this admission. In *Pollard v. Wybourn* (1828), 1 Hagg. 725, though

the husband had not given in his answers, nor submitted his person to inspection, the parties had been married twelve years, there was a certificate that the woman was *virgo intacta et apta viro*, and there were also two confessions of the man of his own incapacity to two medical witnesses. In *Sparrow v. Harrison* (1841), 3 Curt. 16, there had been occasional cohabitation for about seven years, and though the husband had withdrawn himself from the jurisdiction of the Court, and refused to submit to inspection, yet in his answers he had admitted that he had never consummated the marriage.

THE "MEDORA."

THIS was a cause of salvage, promoted by the steam-tug "James and Emma" against the brig "Medora," for services rendered on the night of the 12th December last. The owners contended that the service was merely *towage*, not *salvage* (a), and tendered 4*l.*, which was refused.

The circumstances of the case are stated sufficiently in the judgment of the Court.

Dr. *Twiss* appeared for the salvors; Dr. *Addams* for the owners.

DR. LUSHINGTON. The Court has much to lament in this case. It has to lament, whatever may be its ultimate decision, that a case, where the amount involved is so exceedingly small, should have been brought before this jurisdiction. It has to lament the great multitude of affidavits which have been made on both sides; and it views with great sorrow the contradiction that prevails between them.

I have been urged to look at this case, and to form my opinion as to which side may have been guilty of the offence of perjury. This has never been done by any of my predecessors during the time I have practised in these courts. The doctrine of Lord *Stowell*, followed up by Sir *John Nicholl*, and acted upon by Sir *Christopher Robinson*, was to get at the truth of the case, but never to take upon themselves to pronounce that one party or the other had been guilty of perjury. See the difficulty in which the Court would involve itself by undertaking so hopeless a task. I hold in my hand thirteen affidavits made on behalf of the case of the salvors; and ten of these are made by persons perfectly disinterested in the result. I apprehend nothing would justify me in coming to the conclusion that they have been guilty of the offence of perjury.

(a) In the "*Princess Alice*," Dr. *Lushington* delivered an elaborate judgment on this point, and stated the principles applicable to the case thus: "Without attempting any definition which may be universally true, a towage service may be described as the employment of a steamer to expedite the voyage of a vessel, when nothing more is required than the accelerating her arrival at the place of destination. Many circumstances, however, are

constantly arising which will give to a towage service the character of a salvage service: it may be sufficient to mention some of them only; as where a ship is disabled in her hulk or rigging, where she is aground, or where the performance of the towage service is necessarily attended with danger, or extraordinary labour, or risk to the steamer. These and similar distinctions and circumstances deserve very careful consideration." 6 Notes of Cases, 585.

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THE HIGH
COURT OF
ADMIRALTY.

May 4.

The services of a steam-tug, within its usual locality, not necessarily *towage*, but may, by circumstances, be raised into *salvage*.

Judgment.

The Court always declines pronouncing either party guilty of perjury.

1853.

THE
"MEDORA."
Judgment.

The real question for the consideration of the Court is, whether this is a case of ordinary towage, or whether there are any other ingredients which would justify the Court in considering it rather in the nature of a salvage service, though one of a very inferior character.

Much has been said as to whether the vessel was upon the Herd Sand or not. On the one side it is distinctly sworn by persons on the spot that she was; and, on the other, that she was not; and one individual has gone the length of saying that he went between the vessel and the Herd Sand. The harbour master says that he continued on the sand till twelve o'clock at night; that he saw the "Medora" brought close to the edge of it; that it is a steep sand, and that he does not consider that she was on the sand during the night in question, though other vessels were. If he used a phrase of this description, — and one would suppose that he had ample opportunity of swearing whether she was on the sand or not, — is it to be wondered at that other individuals may have taken a different, though, perhaps, an erroneous view of the question, and have apprehended that she was on the sand?

Statement on behalf of the owners, shows the service to have been salvage, not towage.

Now, in order to ascertain whether it is a case of towage or not, I will look solely to the evidence on behalf of the owners. According to their statement, the night was perfectly calm, but dark; and there was no wind, or what there was was from S.S.W. In consequence of the draft of waters coming down no less than fifteen vessels broke from their anchors, and drifted down the river. The whole of the river became, *ex necessitate*, in a very dangerous state. When I see that fifteen vessels drifted down the river, that the "Countess of Durham" is sworn to have been lost, that another vessel was *rescued* at the expense of 150*l.*, and that another was on the sand, I must come to the conclusion, beyond all doubt, that any services rendered by steamers going out that night to render assistance to vessels so circumstanced, are not to be considered as mere towage. That very nearly disposes of the question. The steamer finds the vessel at anchor, I will not say on the Herd Sand, but in its immediate vicinity. She had a hawser ready to give assistance when the anchor was got up, and was compelled to wait till that was done. The service lasted three or four hours, and I think the tender is not sufficient. Again expressing my regret that I have to decide a case of such small value, I shall give the sum of 15*l.* (a)

Proctors for the salvors, *Deacon*; for the owners, *Burchett*.

(a) Criteria of salvage merit. depend on all the circumstances.
"The amount of remuneration must It is not a mere question of work

THE "HEDWIG."

THIS was a cause of salvage by the master, the owners, and the crew of the "Ramona," of Yarmouth, a fishing-lugger of about 53 tons burthen, and 11 hands, to obtain a recompense for alleged salvage services rendered to the "Hedwig," a schooner of about 69 tons, bound on a voyage from Gottenburg to Hull, with a cargo of timber and iron. The value of the property salvaged was 860*l*. A tender of 30*l*. had been made and rejected.

The act on petition on behalf of the salvors pleaded in substance *that* about 2 p. m. of the 8th of October last, during a heavy gale from the N.N.W., with a tremendous sea, they were riding at anchor about six miles to the S. E. of the "Lemon and Ower" light-ship in the North Sea, when they descried the schooner reaching in under close-reefed sails; *that* in about half-an hour they observed a large flag flying in her topmast rigging, but *that* the wind and sea were so heavy that they dared not set sail and proceed to her; *that* at 3 o'clock she had reached within the stream, and to the leeward of their lugger, but owing to the wind and tide being adverse could not fetch her; *that* the crew of the schooner waved and shouted to them, *that* they could not hear what was said, but observing the crew working at the pumps, they, with great difficulty, hove in their anchor, set their close-reefed foresail, and bore down towards the schooner, over which the sea was making a fair breach; *that* her crew informed them in broken English that she was very leaky, and that they had lost themselves, and wanted them to go on board; *that*, after some time, three of them succeeded with great difficulty, and at the risk of their lives, in jumping for the schooner's quarter and getting on board; *that* at such time she had lost several stanchions and bulwarks on the starboard side, and one stanchion and part of the bulwark on the larboard, and had one foot and a half of water in the pump well; *that* her foretopmast staysail was split, and the main boom (which had been broken) was so badly warped, that the mainsail could not be set until she got into smooth water; *that* her master was

and labour, not a mere calculation of hours, though time is undoubtedly an ingredient; but there are various facts for consideration,—the state of the weather, the degree of damage and danger as to the ship and cargo, the risk and peril of the salvors, the time employed, the value of the property; and, when all these are considered, there is still another

principle,—to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity." Sir John Nicholl, 3 Hag. Adm. Rep. 204.

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THE HIGH
COURT OF
ADMIRALTY.

April 29.

If a vessel out at sea beyond the limits of pilotage ground, requires assistance to conduct her to a place of safety, that is not pilotage, but salvage.

Fishermen salvors cannot claim compensation for the loss of their fishing, unless they clearly state to a foreign master their intention to do so, before their services are accepted.

Tender of 30*l*. overruled, 50*l*. given; but costs refused, because it appeared from salvors' affidavits that they had refused 80*l*.

Pleadings.

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 'HEDWIG.'
 Pleadings.

ignorant of his position, and informed them that he thought he was on the Well Bank, which was about 30 miles to the northward; *that* the master and crew soon went below, leaving her in charge of the salvors, one of whom took the helm, while the other two worked at the pump throughout the night; *that* their lugger kept close ahead of the schooner, and at night hoisted their light as a beacon to her; *that* the wind continued to blow a heavy gale, and the sea frequently broke completely over the schooner; *that* soon after midnight they called up her master and crew to assist in veering her, which they did, and then again went to rest, and remained below till half past four A. M. of the 9th; *that* they (the salvors) beat the schooner through Pakefield Gat, where she was boarded by a Trinity House pilot; *that* about two P. M. of the same day she was brought to anchor close to Lowestoft harbour. The act further alleged *that*, unless thus assisted, the schooner would have drifted upon some of the shoals to leeward, the master being quite ignorant of his position; and *that*, by reason of the said services, the lugger did not reach her fishing ground until the night of the 11th, having lost the fishing on the two previous nights; and *that* the average profit from fishing on the said ground, made on the said two nights by luggers of the same burthen as the "Ramona," was 60*l.* or thereabouts for each night.

The answer on the part of the owners of the "Hedwig" admitting to some extent their damaged state, alleged *that*, as she was approaching the English coast, her master, seeing a fishing boat about two miles off, *hoisted a flag as a signal for a pilot*, and about an hour afterwards, upon the "Ramona" coming alongside, hailed her, and requested one of her hands to come on board to pilot his schooner inside the banks to Yarmouth or Lowestoft; *that* the only flag hoisted on board the schooner was hoisted at her foretopmast head, and not in her rigging, and was the usual signal for a pilot and nothing more; *that* there was no waving nor shouting to the smacksmen, to whom no one spoke but the master of the schooner, who merely asked them to send a man on board to pilot her; *that* immediately upon the three smacksmen boarding her, he told them that he should employ one man only as a pilot, and that he required no other assistance whatever; *that* he insisted upon two of the men returning to their own vessel, and was only induced to allow them to remain on board the schooner upon their assuring him, as they did, that it would make no difference in the expense, and that the expense, which could be settled by the consul and gentlemen on shore, would not be much; *that* he never for a minute gave up the charge of his vessel to any person save to

his mate; *that* some of the crew never left the deck; *that* the regular watches on deck were kept as usual until the schooner got into smooth water at noon of the following day; *that* none of the smacksmen worked throughout the night; but they sometimes persisted in working at the pumps, in spite of the master's orders that they should not touch them; *that* they occasionally pushed away the crew, and took forcible possession of the pumps; *that* soon after the men boarded the schooner, her master, noticing that the lugger was following, asked one of them why she was so doing; to which he replied, that there was too much wind for them to lay out their nets to fish, and that they were going into port; *that* two of the said men also stated to the same effect to the mate of the schooner.

The answer further denied specifically most of the allegations made on behalf of the salvors.

The reply on behalf of the salvors, and the rejoinder on the part of the owners, consisting chiefly of reciprocal denials, raised no further issue of importance.

Dr. *Haggard* and Dr. *Jenner* appeared for the salvors; Dr. *Addams* and Dr. *Robinson* for the owners.

DR. LUSHINGTON. In this case a tender of 30*l.* has been made, and of course, in order to form an opinion whether that is a sufficient tender or not, the Court is bound to look at and to consider all the circumstances of the case, as they appear in evidence; and, as usual, it is not a very easy matter to ascertain the truth, where the statements on each side are so very conflicting. I think, on the present occasion, the difficulty is in some degree enhanced by circumstances to which I am about to advert.

It appears that the value of this vessel is 860*l.*, and the service, whatever may be its nature, lasted about twenty-four hours. In cases of this kind the Court is in the constant habit of looking to the protest, but always with doubt and hesitation as to what consequences are fairly to be drawn from it, because it frequently happens that its contents depend much upon the notary public who draws it, whether he extracts all the necessary facts; in short, whether it be a perfect or an imperfect document. Upon the present occasion the protest is as full as is necessary for the purpose; but when the Court was about to consider it as a fair statement of the whole case, it was met with this most unexpected obstacle — that it is denied by the master and the mate that it is a true protest. The master and mate swear, in their affidavit, that they well understand sea terms and general ordinary conversation in the English lan-

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Judgment.
April 29.

The "protest" is always an important document. It is the duty of the notary public who draws it to make it a perfect one.

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 {
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guage; and I suppose, upon the faith of that, they make their protest in the English language; not, so far as appears, by interpretation. In the affidavit exonerating themselves, or attempting so to do, from certain statements therein contained, they say that, from inadvertence and mistake, that is, from their partial or imperfect knowledge, according to their own words, of the English language, certain words have been omitted of great importance. This statement is in no degree confirmed by the notary public, who ought to take care that there is no mistake in the protest, and that the whole instrument is understood. If he does not see that it is understood he deserts the duty of the office which he is sworn to perform, and instead of assisting the Court, necessarily leads it into doubt and difficulty. However, for very many purposes, I think myself fully justified in relying on this protest as containing a fair statement of the case.

It states the damage which was done to this vessel. "On Monday, the 4th of October, the top-gallant sail was split. On Thursday, the 7th, the wind had shifted to N. W. Appearers' said vessel shipped a heavy sea, which broke seven stanchions on the starboard side, and stove in and carried away all the bulwarks from the bows to the mainmast, knocking down and disabling two of appearers' crew; and large quantities of water having washed down the hatchways, it was necessary to set the pumps on, and keep them constantly going." It states further that, "about half-past six o'clock p. m. of the same day, appearers shipped another heavy sea on the larboard side, which broke one stanchion and carried away a portion of the bulwarks, and stove in the upper streak of one of the small boats on the deck, again shipping at the same time large quantities of water down the hatchways, it being still necessary to keep the pumps constantly at work." They further say "that the pumps were so kept constantly at work till about 4 o'clock the next day, the 8th, when they observed a fishing-boat, and hoisted a flag to the foretopmast for a pilot; that, about an hour afterwards, the fishing-boat came alongside, the wind blowing a gale from N. W. and N. That appearers hailed them; that they wanted one man to pilot the vessel. These are the facts stated in the protest.

There is another document to which the Court always looks when it is produced for its consideration, namely, the report of the facts taken before the receiver of droits. On this occasion the Court is placed in this predicament: two copies of it differ one from the other; in one respect not material, in another it might be of very considerable importance. The omission as to

Report of the facts taken before the receiver of droits, also another important document, should therefore be carefully drawn, the copies correct.

one is, as to the statement "as far forward as the mainmast." We all know that in cases of this kind the variation of a few words will alter the whole sense, meaning, and effect. And again, in a subsequent part, where they state "they would leave that to the consul on shore." The other copy of the report before the receiver has no such words.

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 Judgment.

I mention this, because, though it cannot seriously affect the judgment of the Court, yet it is absolutely necessary that something should be done to prevent it in future. I intend to direct the registrar to send the two copies to Messrs. Gowing and Son, and request them to certify to the Court which is the true copy, and also, if it is in their power, why there is any variation between them. If there be any good at all in the *Wreck and Salvage Act*; if it does not do more mischief than service, it is in taking these reports *recenti facto*; and if taken with great care and with perfect impartiality, I apprehend they would be of considerable use in assisting the Court to come to a right conclusion. The Court has seen some so concise that they have been of great assistance; others are so loose that it is impossible they can assist it.

Now the vessel having sustained damage, and two of the crew having received considerable injury, a signal was hoisted; and, accordingly, the rule which I laid down upon a former occasion (a), I hold it to be a signal for assistance, and not for a pilot. But again what was the nature of this case? Was it a case in which the words "pilotage" or "pilot" could with safety and propriety be applied? Why, the vessel was thirty-five miles out at sea. There are no pilots to be found there; that is out of pilotage ground altogether. It is true the vessel might require nothing but to be conducted to a place of safety; but that is not pilotage, it is salvage assistance.

Guidance to a place of safety is not *pilotage*, but *salvage* service, when rendered beyond the usual limits of pilotage ground.

Then in looking to it as a case of salvage, of course I come to consider the value of the services rendered. I do not apprehend that the vessel was in imminent danger; and, according to the statement of the salvors, as to the wind, it never could have brought her on the English coast. They say it blew a gale from the N. N. W. till twelve o'clock, when it veered and came back to N. N. E. So far as the Court can form an opinion, there was no possibility of the vessel coming on any coast. The Court

(a) In the case of the "*Felix*," April 4., the Court said, "I have determined to decide these questions in this way,—if the vessel is in a damaged state I shall determine that it is a signal for assistance, because

the vessel wants it; but where the vessel is not in a damaged state, and a pilot only is wanted, I shall construe it to be a signal for a pilot. That seems consistent with probability."

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 Judgment.

will be governed by the value of the services rendered, and not by an ingredient imported into this case, viz. the alleged loss of the salvors. I think that the service rendered was of a salvage nature, deserving a fitting reward, for the use of the vessel herself, and for the detention of the crew; but, if it be attempted, as has been done in this case, to say "we could have got in the herring fishery," the enormous sums which are stated in these affidavits, then I repeat what I said on a former occasion (a), no such sums ought to be awarded, unless there was a full statement made to the foreign master, proved to my satisfaction, that, if the case came here, the demand would be to the immense extent made on the present occasion. I shall entirely reject from my mind all these six affidavits, as to the alleged value of the service; and, not only because it would be a fraud on the foreign master to have effected the service without such disclosure, but also for another reason. I find it stated by the salvors that there was a heavy gale blowing the whole time. I find that when the service commenced they were at anchor; and I do not believe, that, if their affidavit be true, that they would have fished at all. Still I am of opinion that this was a service entitled to be rewarded by a larger sum than the 30*l.* tendered. Leaving out of consideration all the supposed gain in the herring fishery, the judgment of the Court will be to overrule the tender, and give the sum of 50*l.* But when I see it sworn by the salvors themselves in their own affidavit, that 80*l.* was offered, and they refused it, I shall give them no costs, more especially when I look to the pretended value of the herring fishery. The next time salvors come before me with statements as to the herring fishery I think they will have reason to remember it.

Proctors, for the salvors, *Jenner*; for the owners, *Deacon*.

(a) In the "*Nicolai Heinrich*," 17 Jur. 330., "The Court has to consider what has been the loss which the salvors have experienced in deserting their occupation of fishing and rendering this service. This latter circumstance is one to be treated with some tenderness, but the principle of taking into account the loss they have sustained is not to be carried too far. I entirely agree with an observation made by counsel on that point, that if the representation of the salvors as to the great loss they have suffered is true, considering the services they were called upon to render, they ought not to have taken charge of the vessel without having stated to

the captain the sum they would ask. I wish it to be distinctly understood, as these cases seem to be multiplying, that if persons engaged in fishing are employed in a service of this description, which is not really important, and afterwards think they can induce the Court to give them any possible amount of profit which they think they might have acquired, they had better go on with the latter and not afford their services. In cases of imminent danger, whatever amount of gain they would have acquired by fishing would undoubtedly be taken into consideration, but not in cases such as that now before me."

THE "HOUTHANDEL."

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THE HIGH
COURT OF
ADMIRALTY.

May 4.

Prima facie it is sufficient for salvors to show that they conducted a vessel to a place of safety. The *onus* lies upon the objectors to prove that that place was not the one to which she should have been taken. *Semble*, it is not the duty of salvors to comply with the wish of a master to be conducted to a foreign port, to their own manifest inconvenience.

Statement.

THIS was a suit for salvage, promoted by the masters, owners, and crews of the carrier cutter "Elizabeth," and the three fishing smacks "Ann and Francis," "Elizabeth," and "Britannia," against the "Houthandel," a Dutch galliot, of 138 tons burthen, valued with her cargo at 700*l*. It appeared that she was on a voyage from Christiansand, in Norway, to Harlingen, in Holland, laden with timber; when, upon the 7th October last, she met with a severe gale, and was struck by a heavy sea, which broke and partly unshipped her rudder, and caused other considerable damage. About 7 A.M. on the following morning, when about thirty-five or forty miles from the Texel, she made signals of distress to the vessels proceeding in the cause. They took her in tow, and brought her safely to anchor at Lowes-toft, about 2 P.M. of the 10th October.

The service was not denied; but on the part of the Dutch owners it was alleged, *that* the salvors had agreed with the master of the "Houthandel" to tow her to the Texel; *that* they intimidated her crew into leaving her, and *that* they had otherwise misconducted themselves by wasting and pilfering her stores. These averments were denied by the salvors, who further alleged in reply, *that* it would have been extremely dangerous to proceed to the Texel at that time.

Dr. Haggard and Dr. Jenner appeared for the salvors; Dr. Bayford for the owners of the galliot.

DR. LUSHINGTON. This is an application for a salvage reward, made on behalf of the owners, masters, and crews of four fishing smacks, amounting altogether in tonnage to 233 tons, with thirty-five men. They allege that they performed certain services to this vessel, which was in distress, and, therefore, claim to be rewarded.

Judgment.

The "Houthandel" was on a voyage from Christiansand to Harlingen; and I will first take the general representation of the salvors, and see how far it is supported by fact; and then, whether the defence of the owners is sufficiently or to any extent made out. The salvors represent that this vessel was at the time they saw her in a state of considerable distress. I think that that is a point which is not in any degree disputed in this case; because the Court was, and very properly so, referred to the protest made by the master — a protest which neither was nor could be contradicted in the facts which it contains. It appears that, on the day before that on which the salvors came on

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board the vessel, a heavy sea struck her, and broke and partly unshipped the rudder. It is not necessary to go through the protest. It is stated that the vessel was driving at the mercy of the gale; that she was in an unmanageable state; and that they hoisted a flag for assistance. They state, moreover, that when the flag was hoisted she was then quite in an unmanageable state; not that she had been so previously, but was so at that very period. In the first instance one of the salvors, according to their own statement, goes for the purpose of rendering assistance to this vessel, and a conversation takes place; but, from the state of the wind, or some other cause, there was not a clear understanding between the parties as to what was intended. The first salvor takes the vessel in tow; and a short time afterwards the tow-rope was cut adrift. That proves to my mind that the master intended to be carried to the Texel, and finding they were taking her to the west instead of to the south-east he was dissatisfied, and cut the rope. But this does not show in any degree that this was the apprehension or the intention of the original salvors, if I may so call them, because, from the very moment the rope was put on board the "Houthandel," they directed their attention to the English, not the Dutch coast. About this time the three other smacks came up, and then the vessel is boarded by some of the persons; and, according to the statement of the salvors, the master and crew were so much alarmed, that they determined to quit the vessel, and carry away all their things. Whether they were instigated to the act, or whether they did it of their own accord, is a matter that may admit of considerable discussion; but the fact that they did quit the vessel, and go in separate divisions on board the three smacks, is undoubted. Immediately after that the vessel is taken in tow, and conducted across the North Sea to the port of Lowestoft.

The salvors say they are entitled to be rewarded upon several grounds. First, for having rescued the vessel, which, they say, was in considerable peril, and would have been lost but for them; secondly, that being engaged in carrying ice to a large number of vessels occupied in fishing, they made a great sacrifice, and lost a considerable pecuniary amount for the purpose of rendering this assistance.

Now, what is the answer on the part of the owners? They do not deny the condition of the vessel; they do not deny the necessity for assistance; they do not deny that assistance was successfully rendered; but they set up as a defence, not merely that this vessel ought to have been carried to the Texel, but they say that there was an engagement to that effect. I am

very clearly of opinion that there is no adequate proof of any such engagement having been entered into. Then the question arises, whether it was the duty of the salvors to take the vessel to the Texel, or whether they have discharged all which the law could require of them in carrying her to Lowestoft?

I entirely agree in all that has been cited by Dr. Bayford from the case of the "*Duke of Manchester*" (a), that wherever salvors undertake to perform a service, it is their duty to show adequate skill in performing it, so as to bring it to the best termination; but that case appears to me to be as little applicable to the present as can well be conceived. The "*Duke of Manchester*" was taken in tow by the steamer "*Copeland*," which might, with ordinary care, have prevented her getting upon Sandwich Flats. My judgment was affirmed by the Privy Council (b), and to the principle contained in it I am anxious to adhere; but I must not extend that principle to the present case, which appears to differ from it so essentially. How does the case stand? It is agreed that the Texel was a lee shore, but, on the other hand, the wind was favourable to conduct the "*Houthandel*" to it. It depends upon a variety of circumstances, upon which I am not competent to form an opinion, as to whether the vessel could have been carried to the Texel or not. When the case was first brought to my notice, this very point suggested itself to me, and I thought it right to mention it at the time, but neither party applied for the attendance of Trinity masters. (c) The general rule on which I act is, that if both

1853.

THE
"HOUTHAN-
DEL."
Judgment.

Salvors bound to show adequate skill in performing the service they have undertaken.

Rule respecting the attendance of Trinity masters.

(a) 4 Notes of Cases, 575.

(b) *Sherby v. Hibbert*, 5 Notes of Cases, 470.

(c) The practice of the Court of Admiralty in obtaining the skilled assistance in court of the Trinity masters, and out of court of the registrar and merchants, has such peculiar advantages, that it is worth considering the principle upon which the Court proceeds. It is stated by Dr. Lushington, in the "*Alfred*," 7 Notes of Ca. 354.: "With regard to the principle upon which the Court must proceed, I cannot quite accede to the arguments of counsel in support of the report. I apprehend that, however incompetent I may be to discharge the duty devolving on me, yet it is a part of my duty, of which I am not entitled to divest myself, to form my own opinion upon the evidence laid before me, as to whether the items objected to have or have not been properly disallowed. I do not think that the instance

which has been put, namely, the case where the Court is assisted by Trinity masters, is either correct in point of fact or apposite to the question; because I never yet pronounced a single decree, when I was assisted by Trinity masters, in which I was not perfectly convinced that the advice they gave me was correct; and if I had entertained a contrary opinion, notwithstanding all their nautical skill and experience, I am clearly of opinion, having deliberated much on that question, that it would be my duty to pronounce such contrary opinion. The custom of the Court, in asking the opinion of the Trinity masters, is to request them to state their reasons and their explanations, and if these explanations are not satisfactory to the Court it does not take them; and the Court never allows persons, perhaps inexperienced in the administration of justice, to raise inferences from a supposed state of facts which does

1853.

THE
"HOUTHAND-
DEL."
Judgment.

Primâ facie, it is sufficient for salvors to show they have brought the vessel to a place of safety. Then the *onus* lies on the objectors to prove that the salvors were unskilful.

Semble, that salvors are not bound to go out of their way to any port which the parties assisted may name.

parties ask for Trinity masters, I accede to the proposition; where one party only asks for them I read the papers and exercise my own judgment as to whether they shall attend; but where neither party prays them, I rarely direct them to be called in. So it is in the present case, which I must now decide to the best of my own unaided judgment. Now, it has been alleged that the salvors ought to show that they have conducted themselves according to the safest mode of navigation; but I am of opinion, that as they brought the vessel in safety to Lowestoft, and the objection is that they ought to have gone to another port, it lies on those who raise the objection to prove by adequate testimony, to the satisfaction of the Court, that it is right. *Primâ facie*, I am bound to believe on the credit of these persons, skilled as they are in navigation, that Lowestoft was as safe a port as the vessel could be conducted to.

But there is another question behind. I am by no means clear that, had it been possible for the salvors to carry this vessel to the Texel, and that they had sufficient knowledge of the sands, they were bound to go out of their way to do it. I think I must dismiss that question altogether.

There is another point in the case to which I will advert, and that is, the alleged charge that the crew had been induced, by the representations of the salvors, to leave this vessel. It is almost impossible, amidst the contradictory evidence which appears in this case, to be able to say with confidence where the balance lies, and I must take the fact alone. I do not mean to say that the masters of the smacks conspired with their crews to induce the master and crew of the "Houthandel" to abandon the vessel; but it sometimes does happen that salvors are rather prone to induce a master and crew to leave a vessel, because it looks better, when they come into Court, to have a case where the master and crew have despaired so much of saving their ship that they have quitted it, while others saved it. I see nothing on the present occasion to justify the crew in having so done, but I am not satisfied that there was any conspiracy to induce

not appear in the cause. It fortunately has happened that, in but very few instances, has there been a difference of opinion between myself and the Trinity masters, and in no case whatever have I pronounced any judgment except it was my own.

Upon the present occasion the Court undoubtedly is disposed, in the first instance, to receive the report of the registrar and merchants with the strongest desire to believe that it is one correctly made, be-

cause the Court has from experience well known the pains, and labour, and judgment bestowed on these reports, which are very seldom objected to, and which I believe have given the greatest satisfaction to the public at large. But when a case is brought before me, and I have the evidence before me, if my judgment should differ from that of the registrar and merchants, I have no other alternative than to follow the dictates of my own mind."

them to do it. In my final judgment, I shall not rely on the abandonment as an ingredient in the case, proving that there was greater danger and risk than has been allowed on the part of the owners.

I must also refer to the charge which has been preferred of pilfering, of destroying the stores, consuming and making away with them. Such a charge as this must always be most distinctly proved. Where salvors are on board a vessel for the purpose of rendering her assistance, nobody can doubt that they are entitled to consume all that is necessary of the stores for the purpose of maintaining themselves in the discharge of that duty; and really, if there be some waste under circumstances of this kind, it is impossible for the Court to look into minutiae or to rely upon it. When such a charge is set up by owners, by way of defence to a demand for salvage, it must be recollected that those who bring it have a great interest in supporting it. It appears to me that the charge is in no degree substantiated.

All that remains for the Court to do is to allot that sum of money which it thinks right and fit to give to the salvors. The whole value of the property is but 700*l*. For some reason, I cannot tell why, the action has been entered for no less than 600*l*; and, what is worse, bail has been taken for that sum. The salvors could by no possibility have conceived that they would be entitled to that amount under any circumstances. With regard to the damage done to the hawser, and the loss of the ice, I mean to take that into consideration in the sum which I shall allot, which is 120*l*.

Proctor for the salvors, *Jenner*; for the owner, *Deacon*.

1853.
THE
"HOUTMAN-
DEL."

Judgment.

During a salvage service, the salvors have a right to an adequate maintenance from the ship's stores.

Compensation for loss of ice.

BROWNE AND THOMAS v. THOMAS.

THIS was a business of proving, in solemn form of law, the last will of George Thomas, late of Old Broad Street, in the city of London, and of Woodside Lodge, Upper Norwood, deceased, bearing date 14th June, 1852, promoted by John Browne and Elizabeth Thomas, widow, the relict of the deceased, the executors named in the said will, against Henry Thomas, the brother and next of kin.

In the will the testator did not describe Elizabeth Thomas as his wife; but he gave her a legacy in these words: "I hereby give and bequeath to Elizabeth Thomas, of Woodside Lodge,

PREROGATIVE
COURT OF
CANTERBURY.

June 4.

Revocation of will by subsequent marriage.—*Held*, a party may plead the marriage generally, in order to obtain the answers of the other party as to the fact.

Statement.

1853.
 BROWNE AND
 THOMAS
 v.
 THOMAS.
Statement.

Weston Hill, Upper Norwood, all the furniture, plate, linen, jewellery, musical instruments, wine and spirits, belonging to *me*, now in the house *we* occupy (namely, Woodside Lodge, aforesaid), or may be in the house we are residing in at the time of my decease:” and further bequeathed her two-thirds of the residue, and nominated her executrix.

Allegation.

The will was propounded by the executors in an allegation, merely pleading the due execution of the will, and the appointment of John Browne and Elizabeth Thomas *his wife*, executors.

A responsive allegation was then brought in on behalf of Henry Thomas, the brother, pleading as follows:—

First Article. That George Thomas the deceased, in this cause, at the time of the execution of the will propounded in this cause, to wit, on the 14th June, 1852, was single and unmarried.

Second Article. That on a day subsequently to the said 14th day of June, 1852, but the time more particularly the party proponent is unable to set forth, the said deceased duly and legally intermarried with Elizabeth Thomas, nominated and appointed an executrix in the said will, and one of the parties in this suit, whose maiden name the party proponent is unable to set forth.

Argument.

Dr. *Haggard* and Dr. *Twiss* now opposed the admission of this allegation. It was desirable to take the opinion of the Court upon the proper mode of pleading revocation by marriage under the 18th section of the Wills Act, as this appeared to be the first case of the kind. The present allegation is far too general. The party should have made some investigations before opposing a will. He raises a point of law that this will is revoked by a subsequent marriage, and yet pleads no particulars of such marriage, not even its time or place, or the name of the lady. In fact it is nothing more than a “fishing” allegation to obtain the answers of Mrs. Thomas as to the fact of marriage. Parties who rely on a fact of marriage to revoke a will, ought to be prepared to plead and prove some particulars respecting it. This allegation is merely a mode of asking a question, not pleading a fact.

Dr. *Jenner*, in support of the allegation, was not heard.

Judgment.

SIR JOHN DODSON. I have no hesitation in admitting this allegation. It has been objected that the sole object of the party is to obtain the answers of Mrs. Thomas. But I apprehend parties have always a right to get an answer upon oath. There is nothing in this case to form an exception.

Two executors were appointed in the will propounded in this cause, one of whom is Elizabeth Thomas. A condidit has been given in on behalf of these two executors. On behalf of the brother of the deceased an allegation is brought in pleading that, subsequent to the date of the will propounded, the deceased intermarried with Elizabeth Thomas, the executrix. It does not deny the execution of the will, but pleads that it has been revoked and nullified by a particular fact. That fact is peculiarly within the knowledge of the executrix; for she must know whether or not she was married to the deceased since the 14th of June, 1852; and I am clearly of opinion that the party is entitled to her answers upon that point, and therefore admit the allegation.

Proctors for the executors, *J. K. and G. Burchett*; for the brother, *Glennie*.

1853.
BROWNE AND
THOMAS
v.
THOMAS.
Judgment.

“ THE PANTHER.”

THIS was a suit for damage, by plea and proofs, promoted by the “New Union,” a schooner of 162 tons burthen, against the “Panther,” a steamship of 292 tons, belonging to the General Steam Navigation Company. The schooner was bound from London to Beesheer, in the Persian Gulf, with a general cargo of merchandise; the steamer was bound from Ostend to London with a general cargo, and about twenty passengers. The loss sustained by the schooner was estimated at about 18,000*l*.

The libel on behalf of the schooner pleaded in substance, *that*, about six o'clock A. M. of the 18th of December last, she was in midchannel, and about a mile above the Nore light, on the larboard tack, heading E. S. E. with the wind from N. by E. and the morning clear; *that* while the crew were setting the reefed mainsail, the pilot, who was on the port bow, and the master, who was at the wheel, observed the two paddle-box lights of the steamer, distant about a mile, a little on the starboard bow, and rapidly approaching; *that* by order of the pilot the helm of the schooner was immediately put hard-a-port, and was so kept until after the collision; *that* she thereupon fell off several points; *that* the pilot loudly hailed the steamer to port her helm, but no notice thereof was taken by those on board; *that* shortly afterwards the steamer, without altering her course, ran stem on with full speed into the schooner, cutting her down below the water's edge, &c.; *that* the pilot, master, and crew thereupon got on board the steamer; *that* within a minute or two after the

HIGH COURT
OF
ADMIRALTY.

May 25.

A vessel is not barred of her remedy in a case of collision, by the mere fact of her having neglected to show a light according to the orders of the commissioners, unless it appears that neglect in some degree contributed to the accident.

Pleadings.

1853.
 {
 THE
 "PANTHER."
 Pleadings.

collision the steamer backed clear of the schooner, and a boat having been lowered, the master, pilot, three of the schooner's crew, and two of the steamers, boarded the schooner and found six feet water in her hold; *that* she was thereupon towed by the steamer to Shoeburyness, on the coast of Essex, where, being nearly full of water, she grounded on the sand, &c.; *that* the collision and the damage consequent thereon are *imputable solely to those on board the steamship "Panther,"* to wit, from the want of a good look out or otherwise on board that vessel; *that* the same were *not owing to any misconduct of any description on the part of those on board the schooner, "New Union;"* *that* &c.

The allegation on behalf of the owners of the "Panther" pleaded in substance, *that* about a quarter past five, the wind blowing very heavy from N.W., and the morning extremely dark, she passed about half a mile to the northward of the Nore light and proceeded up the river, her course then being about N.W. by W. half W.; *that* when about three miles above the Nore light, at about a quarter before six o'clock, the schooner, "New Union" was seen from her distant about half a mile, and about two points on her starboard bow, running down with the wind (which still blew strong from about N.W.) free on her larboard quarter, and the tide then about half an hour ebb, and still well open on the steamship's starboard bow; *that had the two vessels continued such their courses no collision could have occurred,* but *that* when within about three or four ship's lengths from the steamship, the helm of the schooner was put hard-a-port, which brought her athwart the tide, and right across the track and bows of the steamship; *that* the helm of the steamship was thereupon immediately also put hard-a-port, and the engines stopped and reversed by direction of her commander; *that,* notwithstanding, the schooner almost immediately, with her larboard quarter near the main chains, came into contact with the stem of the steamship (although her engines at such time had made three or four revolutions astern) with such force that, &c.; *that* at such time there was a good look-out kept on board the steamship by the watch, and there were three lights exhibited in exact accordance with the orders of the commissioners for executing the office of lord high admiral, made in pursuance of the provisions of 14 & 15 Vict. c. 79. s. 26.; *that* at such time the schooner did not, as required by the said orders, show a bright light, or any light, in any position that could be seen by those on board the steamship; and *that the collision was occasioned by her non-observance of the said orders, and is not in any sort or degree imputable to the steamship, or to any one on board her,* but *that* the same is imputable solely to those on board the

schooner, to wit, for their non-observance of the said orders, and for their unskilfulness and unseamanlike conduct in putting her helm hard to port, and thereby bringing her right across the track and bows of the steam-ship when within three ship's lengths of her, and which if they had not done, from the then relative positions of the two vessels, no collision would or could have occurred.

Dr. *Hagard* and Dr. *Twiss* were heard for the "New Union," Dr. *Addams* and Dr. *Robinson* for the "Panther."

1853.
THE
"PANTHER."
Statement.

DR. LUSHINGTON, addressing the Elder Brethren. Gentlemen, the action in this case has been entered at a very large amount, and though I would fain hope that the loss has in some degree been exaggerated, yet there is no doubt that, upon whomsoever it may fall, it will be exceedingly heavy.

Summing-up,
May 25.

Now, I think it is essential that we should, in the consideration of this case, keep the merits or demerits of the two vessels as distinct as possible. The statement of the "New Union" is, that the collision took place about six o'clock on the morning of the 18th December, in mid-channel, about a mile above the Nore light-ship, and that her course was E. S. E., and the wind N. and by E. The "Panther" represents the wind to have been N. W. There is a great difference as to the quarter from which it was blowing; but whether that is of the slightest importance in this case is a matter for your consideration. It appears that the tide was at that time about half an hour's ebb. The "New Union" had on board a regular Trinity House pilot. There is a difference between the parties as to the precise state of the weather: the one represents it as a dark morning, the other as clear. But I apprehend we may take it to have been an ordinary morning at that season of the year. The "New Union" goes on to state that the steamer was seen about a mile a-head on the starboard bow, and the steamer says that she saw the schooner two points on her starboard bow. The "New Union" states that she immediately ported her helm and fell off several points, but the steamer keeping her course ran into her, and struck her on her port beam. It is admitted on all hands, that, previous to the collision, all the crew of the "New Union," with the exception of the cook, were employed in reefing the mainsail, that the pilot was on the look-out, and the master was at the helm.

The defence is to the following effect: that the wind was from the N. W., and that the course of the steamer was N. W. by W. $\frac{1}{4}$ W., and that the collision took place by reason of the schooner having ported her helm. They would not have touched

1853.

THE
"PANTHER"
Sunning-up.

14 & 15 Vict.
c. 79. & 27.

If there be the slightest probability of a collision, it is the duty of both vessels to put the helm to port.

In a river or narrow channel, a steamer must keep as far as is practicable to that side of the mid-channel which lies on the starboard side.

each other if they had kept their courses. It is alleged that the steamer having observed that the schooner had ported her helm, then, and not before, also ported her helm. Then it is averred that no light was shown on board the schooner, which is an admitted fact.

Now let us consider a little what is the law applicable to this question, as now laid down by the act of Parliament, 14 & 15 Vict. c. 79., because, whatever doubts may have existed previously, that act must be obeyed. The 27th section enacts that, "when ever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master, or other person having charge of either such vessel, perceives that if both vessels continue their respective courses, they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel." In order to call for the fulfilment of this rule, both vessels must be in that situation, that, if they continue their respective courses, they will pass so near as to involve a risk of collision. If there be any probability whatsoever of a collision, then it is the duty of each vessel (a) to put her helm to port. It appears that the schooner did put her helm to port; and we have to consider whether the circumstances were such as to bring the steamer within the rule.

But there is another question arising out of a part of the act which applies to a steamer only, and in considering this, gentlemen, you will bear in mind that the "Panther," previous to the collision, was about mid-channel. The words of the act are, — "And the master of any steam-vessel navigating any river or narrow channel shall keep, as far as is practicable, to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel; and if the master or other person having charge of any steam-vessel, neglect to observe these regulations or either of them, he shall, for every such offence, be liable to a penalty." Consequently, you will have to consider whether the steamer, at this time, ought not to have been further on the north or Essex shore.

The question then will be, first, whether the steamer was to blame for not keeping closer to the Essex shore; secondly, whether she ought not to have ported her helm as soon as she saw the schooner; and thirdly, whether, if she had so ported her helm, the collision would have taken place, it being certain that the schooner did port her helm. The master of the steamer

(a) This must be taken with the qualification, "due regard being had, as respects sailing vessels, to the keeping each vessel under command;" for in the "Betsey," 8th July, 1853, Dr. Lushington said it

was an absurd construction of the act to contend that, in order to avoid a collision, a vessel close hauled on the starboard tack should port her helm instead of keeping her course.

says that it would inevitably have taken place; but that is a matter of opinion, not of fact. You will also have to consider, the shortest distance at which the steamer is represented to have first seen the schooner being half a mile; whether, if she had then ported her helm, she would not have avoided the collision.

With regard to the schooner, it is an admitted fact that she did not show a light when she saw the steamer; and it is abundantly clear to my mind that the rule to do so was under the circumstances binding upon her. But what is the construction to be put on the act of Parliament upon this point? This question of law it is my duty to decide. The 28th section is in these words: "If in any case of a collision between two or more vessels it appear that such collision was occasioned by the non-observance of either of the foregoing rules, with respect to the passing of steamers or the exhibition of lights, the owners of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatever."

A case was cited at the bar in which Chief Baron *Pollock* (a) said truly, that at common law this made no alteration from the old law. I am not inclined in the slightest degree to differ from the construction which he has put upon the act. He said that if the neglect of the rule was the occasion or cause of the collision, in whole or in part, there could be no recovery. Accordingly, the question which I put to you is, whether you are of opinion that the collision was occasioned, either in whole or in part, by the schooner omitting to show a light. It is necessary for us to be rather particular in affixing a meaning to the word "occasion." It has been averred by the "*Panther*" that the collision was occasioned by the non-observance of the order as to a light; but, with respect to evidence on that subject, there is next to none, and you will have to consider whether, in point of fact, the absence of a light altogether did occasion this collision, or whether it did not take place solely and entirely in consequence of the steamer not porting her helm, provided that she ought to have adopted that measure.

In order that we may not leave any point untouched which is important in the case, I mean to request your opinion upon this last question, whether the collision was occasioned solely by the fault of the "*Panther*" in not immediately porting her helm when she saw the schooner half a mile off. There is one other matter which I think it right to mention, Was there a proper look out on board the schooner? It is unquestionably true that the only look out was the pilot; but the question is, whether

1853.

THE

"PANTHER."

Swimming-up.

Though it be the duty of a vessel to show the lights prescribed by the act, yet she is not barred of recovery unless the collision be occasioned, in whole or in part, by the neglect of that duty.

(a) *Morrison v. The General Steam Navigation Co.* 1 Com. L. Rep. 66.

1853.

THE
"PANTHER."

there was a sufficient look out to ascertain that a vessel was coming in time to avoid it?

The Court and the Elder Brethren having retired for consultation, on their return,

*Opinion of
Trinity
Masters.
May 24.*

DR. LUSHINGTON said, The first question which I addressed to the Trinity Masters was in these words: — "Ought not the steamer to have ported her helm as soon as she saw the schooner?" The answer is, "She ought." Secondly, "If the steamer had ported her helm as soon as she saw the schooner half a mile off, would the collision have taken place, it being certain that the schooner did port her helm?" Answer, "Certainly not." Thirdly, "Was the collision occasioned, in whole or in part, by the schooner omitting to show a light?" Answer, "Certainly not; for, according to the statement of the steamer herself, she saw the schooner in ample time to have avoided the collision, had she immediately ported." Fourthly, "Was there a sufficient look-out on board the schooner?" Answer, "Under the circumstances the look-out was sufficient; the steamer was seen in time, and proper measures were pursued in time." Fifthly and lastly, "Was the collision occasioned solely by the fault of the 'Panther' in not immediately porting her helm, when she saw the schooner half a mile off?" Answer, "Yes."

I pronounce against the "Panther."

Proctor for the "New Union," *F. Clarkson*; for the "Panther," *E. Toller*.

HIGH COURT
OF
ADMIRALTY.

June 2. & 18.

A ship, belonging to a British owner at Liverpool,

having been taken by alleged pirates, and re-captured by one of her Majesty's ships of war after her master had been killed, was placed in charge of a master of the royal navy to bring to Liverpool. Having suffered considerable damage, he put into the island of Fayal, and petitioned the director of the customs for an official survey. Three were made. The report was to the effect that the ship could be repaired for about 300*l*. The master being dissatisfied, obtained a private survey, which resulted in a report that the ship was unseaworthy, and should be condemned. The director of the customs then, on the petition of the master, decreed the sale of the ship by public auction, and gave official notice thereof, according to the custom of the place. She was purchased by a Portuguese merchant, who immediately repaired her, and sent her with a cargo to Bristol, where she was arrested by the original owner in a cause of possession. — *Held*, 1. The master had the authority of an ordinary master, and no more. 2. The validity of the sale must be tried by the law maritime. 3. By the law maritime, as well as by the law of England, the sale of a ship by a master, though *bonâ fide*, can be justified only by urgent necessity. 4. With respect to ships, the *lex loci contractus* cannot prevail if opposed to the law maritime. 5. The circumstances of the case do not show an urgent necessity for the sale; and, 6. The sale was invalid, and the ship must be restored to the original owner with costs.

"SEGREDO," OTHERWISE "ELIZA CORNISH."

THIS was a cause of possession instituted by Mr. Philip Henry Dean, of Liverpool, shipowner, under the following circumstances, as stated in the proceedings. The act on petition

on behalf of Mr. Dean in substance alleged *that* this vessel, a brigantine of about 160 tons burthen, then belonging to Mr. Dean, sailed from Liverpool on the 5th of May, 1850, under the command of John Talbot, her master, laden with a cargo of coals and other merchandise, bound on a voyage to Valparaiso and Panama; *that* she safely arrived at these places and discharged her cargo; *that*, after having made some intermediate voyages, and having been thoroughly caulked and repaired at Valparaiso, she sailed thence for Liverpool on 7th of November, 1851, with a general cargo, and a quantity of specie and silver ore on board; *that*, having from bad weather sprung the fore-topmast, she was on the 1st December following, in order to repair her damages, brought to an anchor at Sandy Point (in the Straits of Magellan) a convict settlement of the Chilian government, and *that* whilst there, an insurrection having broken out, she was seized by the insurgent soldiers of the said government, who immediately shot her master and supercargo; *that* she subsequently proceeded to sea with a number of the said insurgent soldiers on board, and whilst at sea was taken possession of by her Majesty's steam-vessel of war "Virago" (a); *that* Commander Stewart, the commanding officer of the "Virago," having put Mr. Bawden, the master of her Majesty's ship "Dædalus," and several seamen in her Majesty's service on board the said brigantine to assist her crew to take her to Liverpool, she, on or about the 10th of March, 1852, sailed for Liverpool where she never arrived; *that* in the month of December last she arrived in the port of Bristol with a cargo of oranges from the Azores, and was there discovered by P. H. Dean (her sole owner), though she was entered, not by her lawful name as the "Eliza Cornish," but by the Portuguese name of the "Segredo;" *that* she was thereupon arrested in a cause of possession.

The prayer was, that the judge would decree the possession of the said brigantine, her tackle, apparel, and furniture, to the said J. P. Dean, with costs.

The answer not denying the former part of the act, in substance pleaded "*that* in the month of March, 1852, the said brigantine was, by the said William Houston Stewart, Esq., acting under the sanction and by authority of Rear-Admiral Fairfax Thoresby, commander-in-chief of her Majesty's ships on the Pacific station (and not of his own authority merely) placed under the charge and command of Charles Bawden, a master in the royal navy,

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(a) Two other suits arising out of this transaction, one for bounty the other for salvage, are now pending in the Admiralty Court, and will shortly be reported.

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Statement.

who accordingly, on the 10th of the said month, set sail in her for Liverpool, having with him R. F. Broadrick, mate, &c. ; *that*, by virtue of this appointment, the said Charles Bawden had full authority, as master of the said brigantine, to act in all things to the best of his judgment for the benefit of the owner, and of all parties concerned ; *that* the said brigantine having suffered severely in a storm and hurricane, Mr. Bawden was compelled, on the 23rd of April, to put into Monte Video for repairs, which were effected at an expense of 875*l*. ; *that* he again sailed for Liverpool on the 25th of June ; *that* on the 15th of August following, when they were in latitude 36° 1' north, and longitude 32° 46' west, running E. N. E. with much swell from the N. W., but little or no wind, the vessel rolling very violently and the crew being engaged in sending down the royal and top-gallant yards and fore-top gallant mast, the fore-topmast of the said brigantine broke short off at the cap, and caused very considerable damage ; *that* eventually the wreck got under the bow and rendered the brigantine unmanageable, and threatened to beat a hole in her bottom ; *that* for these reasons, and because it was found impossible to save any portions of the gear, from the great weight under water, it became necessary to cut everything away ; *that* in consequence thereof Mr. C. Bawden was compelled to put into Fayal at the port of Horta, in which island, being the nearest accessible port, he arrived on the 19th of August ; at which time the brigantine had lost, &c., and so much damage had been done to her ropes and shrouds, that she required a complete refit in that particular ; *that* her hull was in a leaky state, and a considerable portion of her timber and planking was rotten and worm-eaten, owing to age and long service, particularly about the bends and counter, and as well below as above the copper ; *that* she was totally unfit and unsafe to proceed in her voyage without a complete repair of the hull, as well as a refitting of her masts and rigging ; *that* in consequence of such unseaworthiness of the said brigantine, the said C. Bawden, with the assistance of John S. Minchin, Esquire, her Majesty's vice-consul at Fayal, applied to the custom house authorities, and particularly to Don Joao de Carvalhal Noronha e Frias, the director of the custom house at the said port of Horta, to have a proper survey made of the ship, with the view of ascertaining her real condition ; *that* accordingly three several surveys were made by the official persons connected with the said custom house ; *that* the said C. Bawden, for further satisfaction in that behalf, also caused a survey of the said brigantine to be made by Francis Langlois, Francis M. Gardner, and Elisha C. Jenney, master mariners, Hugh Tre-

goning, a caulker in her Majesty's service, and Thomas Vinmar, a carpenter, who reported that, &c., and recommended that she should be discharged to ascertain more fully her condition; *that* the cargo having been discharged, the said brigantine was, at the request of the said C. Bawden, again examined by Caleb Spooner, junior, Owen B. Higgins, master mariners, and Alexander Morrison, ship's carpenter, who reported that, &c. &c.; and that, considering the lateness of the season, together with the cost of spars, sails, cordage, and other things required, they were forced to say *that she should be condemned as unseaworthy*. The answer further pleaded *that*, from the state in which the brigantine then was, the sum that must have been expended on her repairs and in finding her with the tackle, apparel, and furniture that would have been required to refit her for sea in a proper manner, according to the rate of charges prevalent at Fayal, *would have greatly exceeded her value when so refitted*; *that* the port or harbour of Horta, where the brigantine was then lying (and which is the only convenient or commodious port in the said island or its vicinity) is so much exposed to gales from the S. and S.E., during which vessels are frequently driven on shore and lost, that it would have been unsafe to have left her at anchor there in her then disabled state at so advanced a period of the year; *that* there were no means of placing her in dock or otherwise securing her in safety; *that* there is no steam or other regular communication between the said island and this country; *that* Mr. C. Bawden being satisfied of the unseaworthiness of the said ship determined, with the advice and concurrence of the said R. F. Broadrick, H. C. Sedmond, and J. W. Smith (a), as also with the concurrence of John S. Minchin, H. M.'s vice-consul at Fayal, to have her condemned and sold for the benefit of the owners, as usual in the like cases, and accordingly again applied to the custom house authorities on the subject, when such his application was acceded to, and the said brigantine was thereupon, by the said Don Joao de Carvalhal Noronha e Frias, the director of the said custom house, *directed to be sold, and in consequence thereof was afterwards sold by public auction at the custom house*, with her tackle, apparel, and furniture, in several lots, to wit, on the 14th and 15th September, and realised in the whole, after deducting the expense of advertising and commission, a sum equal to 185*l.* 4*s.* 11*d.* or thereabouts; *that* the said director of the custom house at Horta was and is empowered by his office, and by the laws and customs of Portugal

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 Statement.

(a) The original mate of the vessel when she left England.

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Statement.

*as received in the said island of Fayal, to proceed in the manner before mentioned to the survey and sale of any ship or vessel entering the said port, whether Portuguese or of any other nation considered or represented to him by the person in charge thereof to be unseaworthy; that the proceedings taken in the case of the said brigantine were in all respects agreeable to the laws and customs of the said island of Fayal; that due and public notice of the intended sale thereof was given in the manner customary in the like cases, previous to such sale taking place; that such sale was conducted by the official auctioneer employed by the said custom house, and that such the condemnation and sale of the said ship was in all respects an honest and bona fide transaction, determined upon and executed solely for the benefit of the parties interested in the ownership thereof, and of no other persons whomsoever; that at such sale Roberto Augusto de Mesquita Henriques became the purchaser of the hull and of portions of the tackle, apparel, and furniture thereof, and duly paid for the same, whereby he became the true, lawful, and sole owner of the said brigantine, and of the portions of her tackle, apparel, and furniture so purchased; that possession thereof was thereupon given to him, and that by the laws and customs of Portugal which prevail in the said island, he thereby became the lawful possessor of the said ship; that immediately thereafter he proceeded to repair the damage she had sustained and to refit her for sea; which, from his local knowledge and connexions, he was enabled to do at much less expense than would have been incurred by a stranger in effecting similar repairs; that in order thereto the said brigantine was, &c. &c., and the total cost of such repairs, and of the expenses incident to the re-equipment of the said ship, amounted to the sum of 925*l.* and upwards; that the said brigantine having been so repaired and refitted, was chartered by the said Roberto Augusto de Mesquita Henriques to Frederick Dabney, of the said island of Fayal, merchant, for a voyage to England with fruit, and thence to Lisbon, and accordingly sailed on the 10th November last bound for Bristol, at which port she arrived on the 28th day of the said month; that in the course of the voyage she was still very leaky, and made from three and a-half to five inches of water per hour; that whilst at Bristol further repairs were effected at an expense of 140*l.* or thereabouts; that the said brigantine having taken on board a cargo of coals, had proceeded as far as the King's Road on her voyage to Lisbon, when she was arrested at the suit of J. P. Dean.*

The prayer was that the judge would decree a *supersedeas* to the warrant of arrest issued in this cause, dismiss the said

Roberto Augusto de Mesquita Henriques, and condemn Philip Henry Dean in demurrage and costs.

On behalf of the original owner, a reply was brought in to the effect *that*, on the arrival of the brigantine at Fayal, there was very little the matter with her, save that she had lost, &c. &c.; *that* her hull was sound and perfect, although a few planks above water may have been somewhat worm eaten, and a portion of her upper works wanted recaulking; *that* the whole loss in spars and sails was entirely occasioned by the mismanagement and want of skill and seamanship of Mr. Charles Bawden, a master in the navy, who had been unnecessarily put into the command of the said barque by Commander Stewart to the exclusion of her mate John William Smith, who was fully competent and willing to have taken command of her and brought her to Liverpool; *that* the said Charles Bawden caused several of her sails to be cut up to make bags to hold the silver ore, notwithstanding that Mr. Dubary, a merchant of the place, offered to find canvas; *that*, on the 4th September, the barque was surveyed by José Francisco de Silveira, a master mariner and pilot; Adrian José Joaquim and Joao Menzies, carpenters; and Bernado Antonio da Costa and José Garcia da Roza, caulkers; whereby it appeared that her hull was in good condition, and that the whole sum required to be expended on her for shifting a few of the upper planks and recaulking her upper works, and for new spars, rigging, and sails, amounted to about 300*l.* sterling, which amount Mr. John Lane, Lloyd's agent at Horta, offered to advance, but which the said Charles Bawden refused to permit him to do; and instead thereof, without calling for the attendance of Lloyd's agents, or any of the aforesaid surveyors, obtained a *private survey* to be held on the said barque, and *procured her to be condemned, and without any communication with her owner* in England, sold her for the sum of 185*l.* 4*s.* 11*d.*; *that* having so sold her, the said Charles Bawden, in conjunction with John S. Minchin, employed by the said Charles Bawden as mercantile agent in respect of the cargo of the said ship, made out an account of the port charges and disbursements in regard to the said ship, which, with the mercantile commission of the said John S. Minchin, amounted to the sum of 658*l.* 2*s.* 10*d.*; *that* the said Charles Bawden thereupon opened one of the boxes of treasure, and took thereout the sum of 472*l.* 17*s.* 11*d.*, and also a further sum of 200*l.* (part of the said treasure), which sum remains to be accounted for; and *that* the said Charles Bawden also claims a further large sum. The reply further expressly denied the expenditure of 925*l.* and 150*l.* by Mr. Henriques, in repairs as pleaded in the answer;

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CORNISH,"
Statement.

and then alleged, *that it was not legally competent to the said Charles Bawden, under the circumstances pre-alleged, to have the said barque sold, and more especially without first communicating with her owner at Liverpool (the distance from Fayal to Liverpool occupying a sailing vessel only fourteen or fifteen days); that the said sale was illegal; that the name of the said barque was improperly changed, and that she had thereby nearly escaped from Bristol; and that the said barque, as she now lies at Bristol, is fully worth the sum of 1400*l*.*

Argument.

Dr. Haggard and Dr. Twiss argued the case in behalf of the British owner; Dr. Addams and Dr. Spinks for the Portuguese purchaser.

Judgment.
June 18.

DR. LUSHINGTON. As I understand that the ship which is the subject of the present litigation is still detained and bail has not been given, I have been very anxious to dispose of this case at as early a period as possible, at least at as early a period as would enable me to pay due consideration to several points of no small difficulty that have been raised in the discussion in this case. I could have wished, indeed, to have more time and leisure, and to have placed in a much more lucid order the observations which I think it necessary to make; but still it appeared to me better to omit any attempt of that kind rather than incur any further delay.

The action brought is technically called a cause of possession; but, in fact, the question for the Court to try and decide is, a question of title, to determine which of the parties litigant is entitled, not only to the possession of the ship, but to a full right of property in her.

This question the Court has now ample authority and jurisdiction to decide by virtue of the statute 3 & 4 Vict. (a) The limit of the jurisdiction of the Court of Admiralty in causes of possession antecedently to the passing of that statute, it would, in my judgment, be wholly impossible to define; suffice it to say, that I think this suit is properly brought as a cause of possession; and that, in such case, the statute renders it my duty to decide upon the title to the ship.

Perhaps it will be necessary, in the course of this judgment, to enter with particularity into consideration of some of the facts set forth in these proceedings; but at present, in order to

(a) 3 & 4 Vict. c. 65. s. 4.: "And be it enacted, that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining

in the registry, arising in any cause of possession, salvage damage, wages, or bottomry, which shall be instituted in the said court after the passing of this act."

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ascertain the questions to be determined in the cause, I think it would be most expedient to give only an outline of the case.

This vessel was originally a British vessel, and the property of a British merchant, who has instituted the present proceedings. She was sent to the Pacific, and there occupied in voyages that I need not specify. Finally, on or about the 7th November, 1851, she was dispatched from Valparaiso to Liverpool with a very valuable freight of specie, silver, and some other merchandise. In the course of that voyage she was under the necessity of coming to anchor at Sandy Point in the Straits of Magellan, a convict settlement belonging to the Chilian government. There she was seized and taken possession of by an overpowering force. From that force (whether that force was deemed to be insurgents or pirates, I stop not to inquire) she was rescued by her Majesty's ship “*Virago*,” commanded by Captain Houston Stewart. I should observe, it appears to me wholly immaterial for the purposes of this suit, whether the ship was rescued from insurgents or pirates. Before this rescue had occurred, the master, who is represented as supercargo and part owner, in some of the proceedings was murdered.

Captain Stewart, under the orders of Admiral Thoresby, who commanded upon that station, placed the vessel, which had been brought back to Valparaiso, under the command of Mr. Bawden, a master in the navy, with directions to take her to the port of Liverpool, whither she was originally destined. Mr. Bawden, with two or three petty officers and some seamen in her Majesty's service, together with the remaining part of the crew of the vessel, took charge of her, the mate and several of the crew still remaining on board her, and the ship proceeded on her voyage. She proceeded on her voyage, as I understand the facts, with the same treasure with which she had been laden when she left Valparaiso originally, it having been rescued from the “*Florida*,” an American vessel, also seized at Sandy Point under similar circumstances.

In the prosecution of that voyage, in consequence of contrary winds and tempestuous weather, the vessel was compelled to take shelter at Monte Video, where she arrived on the 23rd of April, 1852, and was detained till the 25th of June following; and the repairs there done amounted, together with the expenses, to 875*l*.

On the 25th day of June she left Monte Video for Liverpool, but having met again with bad weather and other accidents, she was compelled to make for the island of Fayal, and on or about the 19th of August came into the port of Horta. Mr. Bawden then adopted the following measures: He had surveys made of the

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ship, and in his judgment it appeared inexpedient to repair her; and accordingly, with the consent of the superintendant of the customs in that island, she was sold by public auction; the cargo was transhipped, as I collect, into another vessel; and after many disasters and another transhipment, finally reached England. This vessel, the "Eliza Cornish," was repaired at considerable expense by the purchaser at Fayal, and he sent her on a voyage to the port of Bristol, where she was arrested at the suit of her original owner, Mr. Dean; and I have now to determine whether Mr. Dean is entitled to have possession of her given by the Court, whether he is entitled to the property in her, or whether the sale at Horta was legal, and the Portuguese purchaser is entitled to hold her.

No bill of sale
produced.

Now I may here mention that there does not appear to have been produced, and for what reason I am unable to say, any bill of sale whatsoever. Of course this is the document that the Court naturally looks for in the first instance, it being the ordinary title by which any and every ship is sold which is sold. But I neither find any bill of sale properly so called, nor do I find any thing equivalent to it, or in lieu of it. I am therefore left to conjecture what was the nature of the title purported to be given by those who sold her.

Now the above is a very imperfect outline, as I well know, of the history of this transaction; but, as I mentioned at the outset, I abstain from going into greater detail at present, because I must necessarily do so when certain particular questions arise hereafter. I think, however, what I have said is sufficient to lay the foundation for the following leading questions:—

The first question is, By what law is the Court's decision to be governed?—by the general maritime law, the municipal law of England, or the law of Fayal?

The first question which presents itself to my mind is, By what law is the Court to be governed in resolving the points submitted to its decision?

1st. Am I to take that which is sometimes called the general maritime law of all nations engaged in marine enterprises?

2ndly. Am I to adopt the law of England, which may be different?

Or, 3rdly, Am I to be governed by the law prevailing at Fayal?

Now these are questions which require great consideration, and respecting which the Court would be reluctant to lay down any rule or principle beyond that which is indispensably requisite to the decision of the present point. It would be rash indeed, if in matters of this kind I were to endeavour to reconcile all the conflicting cases, and to extract out of them any general rule, when I find so many minds of great ability, talent, and

research, have certainly abstained from anything like an attempt of the nature.

The Court must ever bear in mind that this is a transaction taking place in a foreign country, and in which the interests of a foreign subject resident in that country are concerned; but the Court must also recollect that, in the same transactions, are involved the interests of a British owner, and that the acts done were done by a British subject authorised in some way or other to govern and to dispose of the ship; and that he was there not as a permanent resident, (I am speaking now of Mr. Bawden,) but an individual, by the accident of the wind and weather, compelled to put in for a temporary purpose. There is a wide distinction in contracts which are entered into in a foreign country by a British subject resident there for a permanent purpose, and contracts entered into by a British subject accidentally entering it.

First, it strikes me that the law which I must seek to administer, if I am able to discover it, is the law maritime; a law which has been often adverted to by Lord *Stowell* and by others, whose lights I seek to guide me, but which has been defined by none. Perhaps it is not possible to define it with great accuracy, because the law of almost every foreign country in some part differs from that of other foreign countries. Still it is, an expression in common use, and I apprehend it is intended to convey the meaning, that it is the law which generally is practised by maritime nations. I think, therefore, this is the law which I must seek to discover, and I must not deviate therefrom by introducing the English municipal law, unless I should happen to be compelled to do so by virtue of statutes which of course it is my duty to obey; because, if it seem fit to the legislature of this country to pass any act which is intended by it to bind foreigners, I, sitting here as judge in the Instance Court of Admiralty, am clearly bound to obey that statute, even though that statute law might not be consistent with the law maritime in any country where the transaction took place. I think, also, that I am equally prohibited from giving effect to the law of the island of *Fayal*, unless it accords with the general maritime law; or in other words, unless upon consideration of the peculiar circumstances of this case, I should be of opinion that the *lex loci contractus* is a part of the general maritime law, or ought to be imported—here is another alternative of great importance,—or ought to be imported for special reasons into this cause.

Now, without saying what the immediate effect would be, I must again repeat what I said before. I ought to exercise great caution in dealing with the interests of foreign persons, and not

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CORNISH."
Judgment.

The Court
must be go-
vern'd by the
law maritime,

unless re-
strained by any
particular
statutes,

or unless for
special reasons
under the cir-
cumstances of
the case, the
lex loci con-
tractus ought to
prevail.

Distinction to
be observed in
dealing with

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the interests of
foreigners and
of British sub-
jects.

with the interests of British subjects only. In the many cases to which I have resorted for information, I regret to say this distinction does not seem to have been always perceived, nor always kept in mind; namely, in the judgments pronounced, the learned judges have been considering the cases before them, and have not recollected, or at least not stated, with any clearness or precision, any difference which they might think existed between the administration of the law as related to foreigners, and the administration of the law as related to British subjects. That would appear especially so with respect to questions of bottomry and hypothecation.

In the very commencement of Lord *Tenterden's* work on shipping, to which I was referred in the course of the argument, the general law as to the sale of ships is fully discussed; and I say the general law for this reason, because, without occupying time by reading that first chapter of Lord *Tenterden's* work, it is perfectly manifest, from the whole of that chapter, that Lord *Tenterden* had in view the general maritime law, as well as the municipal law of this country. He refers to writers on the general maritime law, such as American and others, as well as he does to the authorities of our own courts of law.

It is a principle
of the law ma-
ritime, as well
as of the law
of England,
that masters
have no power
to sell a vessel,
except under
the most urgent
necessity.

Now, by the laws, I take it to be a principle quite incapable of being disputed, that ships in general cannot be sold save by an instrument in writing; and it is equally clear that such instrument in writing must proceed either from the owners or some persons authorised to act and acting as their agents, or else by the decree of a competent court.

Now, the master in general, as is admitted on all hands, has no authority to sell the ship; but whatever opinion may have been doubtfully expressed on the subject, (certainly there have been many opinions, going the length that the master under no circumstances whatsoever can sell,) it appears to me clear upon reason and authority, looking at what the law now is, that in case of necessity he must be invested with that authority and power with regard to the sale of British ships to British subjects. Lord *Gifford* in the case of *Robertson v. Clarke* (a), which is cited at large in *Abbott on Shipping*, laid down the law in as clear terms as I think it has been expressed by any other judge whatever, or any other authority. Now he expresses himself in these words: he says, "I agree that it is not sufficient to show that the sale was *bonâ fide*, and for the benefit of all concerned, unless it be also shown that there was an urgent necessity for its being resorted to." Lord *Tenterden* states, that

(a) 1 Bing. 445.

the doctrine that necessity alone can justify the sale of a ship by its master, and sustain the title of a purchaser from him, is in strict conformity with the laws of other maritime nations; and that is a most important passage, because it shows therefore that, in this respect, that to which I am now adverting, the law laid down by the highest authority in this kingdom is precisely the same law as is laid down, generally speaking, by all other maritime states; therefore the law of England and the great maritime law are in conformity with each other. Lord *Tenterden* cites several authorities for this position, and many similar authorities might easily be added; and especially there might be added many authorities from American writers and American reports. In the course of the argument counsel adverted to some which appear to have a clear bearing on the question, especially the case of the schooner "*Tilton*" (a), in which Mr. Justice *Story* delivered a very able and elaborate judgment. But it is unnecessary for me to do more than mention them.

Now, there is not only the authority of Lord *Gifford* in the King's Bench, but the position is laid down by Lord *Tenterden* himself. That decision of *Robertson v. Clarke* was in 1824, and Lord *Tenterden* published another edition subsequently to that; therefore there is his own confirmation. It would only be a waste of time to cite further authorities. The doctrine is confirmed by *Idle v. The Royal Exchange Assurance Co.* (b), and confirmed by the last decision of all, *Hunter v. Parker* (c): therefore it may be taken to be, beyond all doubt and question, the law of this country as well as the law maritime. There are other reasons why I do not enter into it more particularly, because really, where a position is clear and supported by such authorities as I have stated, there is no necessity for it: there are other reasons, and among these, first, there is no authority to be cited against that doctrine; secondly, that it would be in my judgment most dangerous, it would be most detrimental to the interests of shipowners all over the world, to confer on a master by law a discretionary power of parting with the property of his owners.

I might enlarge very much on this subject, because I might enter into a consideration of how the matter would affect not merely the interests of owners, but the confusion it would create

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otherwise
"ELIZA
CORNISH."
Judgment.

(b) The point of law was similar, but the circumstances different. The Court said, "*Prima facie* the title was suspicious and infirm. It was a sale by a wreck commissioner, who immediately became a purchaser under authority of a master, who

also became a purchaser at the price given at the original sale." 5 *Mason's* (Amer.) Rep. 496.

(b) 8 *Taunt.* 755., 3 B. & B. 151.

(c) 7 *M. & W.* 322.

1553.

“SMURDO,”
otherwise
“ELIZA
CORNISH.”
Judgment.

No definition
of necessity.
It depends
upon the cir-
cumstances of
each particular
case.

Questions for
consideration :

1. What authority had Mr. Bawden?
2. What necessity for sale existed?
3. Are the circumstances such as to induce an exception to the general maritime law?

as to the interests of the insurer and the insured. That is a matter of importance to be considered, and, as it appears to me, nothing is more desirable to avoid than that those great interests by which the mercantile navy are protected to the extent they are by insurance, should be thrown into confusion, or weakened by the introduction of any different principle.

This being so, to render valid, therefore, the sale by a master, there must exist a necessity for that sale; the sale, though *bond fide*, and beneficial to the owners, will not avail without necessity. What circumstances constitute necessity cannot with accuracy be defined. I might say what writers have strained hard to arrive at something like a definition of what necessity is; but it is quite obvious that necessity must depend on a combination of circumstances, which it is impossible to foresee, and impossible duly to estimate. In my judgment it would be more easy to state not what constitutes necessity, but under what circumstances necessity cannot exist. If, for instance, the ship is capable of repair, and the master can raise money either on the bottomry of the ship or cargo, then I conceive no legal necessity can exist for sale. That, I think, will be quite clear.

Now, having thus far endeavoured to clear the way, I must now address myself to the determination of two questions, but rather different; namely, first, the authority of Mr. Bawden to sell; and 2ndly, the existence of necessity which is alleged in this case; and 3rdly, a point to which I have already adverted, whether, under the circumstances, I should be justified in this case in administering any law differing from the general maritime law; or, to use another mode of expression, engrafting a peculiar exception upon it.

To proceed then to consider what authority there was in this case for the sale, I must look to the position in which Mr. Bawden was placed. For this purpose, I deem it unimportant whether the “Eliza Cornish” was rescued from insurgents or pirates; for whatever may have been the proper description of those who forcibly took possession of the vessel, I do not conceive that any distinction can be drawn important to the result of this case out of that forcible and illegal possession. She was rightly rescued by her Majesty’s ship “Virago,” and by the act of Captain Stewart, and the authority of Admiral Thoresby, I think the command of her was duly conferred on Mr. Bawden. I am of opinion that, looking at all the circumstances of this case, and considering the description of cargo that was on board her, that Captain Stewart may have been fully justified in entrusting the command to Mr. Bawden, a master in the navy, and in not allowing the mate to take the place of the deceased

master. It is true that, in ordinary cases, upon the death of a master, the first mate may succeed to the master, though we all know that very frequently, nay, I may say constantly, this course is interrupted by the interference of agents, consuls, or other persons who claim to have interest in the cargo, and the circumstances of this case seem to me to have made it fit that Captain Stewart should exercise his own discretion in this respect.

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I am of opinion, therefore, that Mr. Bawden was duly invested with all legal authority as master; that he possessed the same power over the ship that the former master himself if alive would have had; but I cannot conceive upon what principles it could be contended that he possessed any other or greater power. It is indeed alleged, on behalf of the Portuguese owner, that, by virtue of this appointment, Mr. Bawden had full authority, as master of the ship, to act in all things—I believe I am citing the very words—"to the best of his judgment, for the benefit of the owners, and all parties concerned." Now, that is the position laid down by the Portuguese owner, by virtue of his appointment; and if it be meant by this statement that Mr. Bawden had the same authority as an ordinary master, I concur; if it be contended that he had greater power and authority, then I cannot give my assent to the proposition, for I know of no rule, I know of no principle by which it can be maintained, that either Admiral Thoresby or Captain Stewart had or could acquire any right over this ship, which would enable them to delegate to their own appointee any greater power than belongs to an ordinary master, and certainly not what is contended for in the act on petition, an arbitrary power to dispose of the ship herself. Whether it be a case of salvage or not, I am not to inquire, because, assuming it to be such, no right of sale was consequent on the right of claim for salvage. I conclude, therefore, this branch of the inquiry by repeating my opinion that Mr. Bawden, as relates to the sale of this ship, was an ordinary master, possessing the ordinary power and authority of master, and no more.

Mr. Bawden was invested with all the authority of an ordinary master, but no more.

I will now refer to the steps adopted in the island of Fayal, which appear to be as follows:—Mr. Bawden, on his arrival at the port of Horta, obtained the assistance of Mr. Minchin, her Majesty's vice-consul at that place; and he applied to a person, who is denominated either the director or superintendent of the custom house, to have a proper survey of the vessel, and very fitting measures they were to be taken. Three several surveys were accordingly made, on the 21st and 24th of August, and the 4th of September; and they were made by persons connected with the custom house; and to these surveys I must now direct my

The circumstances of the sale. Three official surveys.

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attention. They are found annexed to the affidavit of Mr. Bawden, and in the document marked C.

Now the first survey, bearing date the 21st of August, does not represent the vessel to be unseaworthy; but it merely states the loss which she had sustained with regard to the topmast and other matters: that I need not recapitulate; and that she required to be caulked, not making any water at anchor. That, I think, is the substance of that survey. Then the director of the custom house appears to have given an order that this survey should be carried into effect by doing what was mentioned in the survey itself.

However, this was not deemed satisfactory; and the next survey, which we have on the petition of Mr. Bawden, takes place on the 24th of August; and the surveyors there reported that they had newly examined the hull, and that they had found some worm holes which had been covered by the copper, and they directed that the vessel should be discharged. This survey, as well as the first, took place in the presence of Mr. Lane, who was agent for Lloyd's.

Now the cargo having been taken out, and the vessel discharged, the third survey was made on the 4th September. Then, of course, there was ample opportunity for those who made the survey to ascertain the precise state and condition of the vessel, whether capable of repair or not, and what was the extent of the repairs to be done, and what would be the probable amount of cost. They report, amongst other things, that the hull was in good repair, and she would be navigable when certain repairs therein stated were done; and the repairs there stated are estimated at about 300*l*. I believe I have stated accurately the summary of the contents of that survey.

But the matter does not rest here. Mr. Bawden was dissatisfied, and the course which he adopted I must now advert to. The proceeding taken by Mr. Bawden was not founded upon any further survey under the authority of the customs; but he presents a petition, on or about September 10th, stating, for the reasons therein set forth, that he considered it, for the interest of all concerned, to sell the vessel, and he petitions the director of the customs to give the necessary directions for the sale of her as customary; the petition is granted; the vessel is sold on the 14th or 15th September; and, after deducting the expenses, realised about 185*l*. 4*s*. 11*d*.

In considering this proceeding, by the director of the customs, the first observation that necessarily strikes one is, that the sale neither was nor could be justified by the official surveys already had, because these official surveys, so far from recommending

The sale not
justified by the
reports of the
official, but
adopted on
those of pri-
-ate surveyors.

the sale, the purport of them is, that the vessel was repairable, and that at the expense of 300*l.* only. I must observe I cannot but entertain some little hesitation as to the extent of consideration to be given to the proceedings of the superintendent of the customs who orders the surveys to be made; orders the three first to be carried into execution in the way he has done; and then, all of a sudden, without a fresh survey, upon the mere representation of persons acting for the master, gives up at once all he had previously determined, and orders the vessel to be sold. It makes one distrust, like other courts, the proceedings by the commissioners of wrecks: it makes one distrust proceedings by superintendents of custom houses: it makes one distrust acting under the advice of such masters and persons of that description.

Now, throughout all that proceeding, it is quite manifest that Mr. Bawden was in reality not governed by anything that was done at the custom house, not at all; it was form, a mere shadow; it had no substance, no reality, because he had recourse to other advice. He had an examination made of the vessel in the first instance, on or about the 21st August, by persons on board her, who at that very early period signed the letter marked A., addressed by Mr. Bawden to Mr. Minchin, the British consul. That letter marked A. is to the following effect:—"Sir, I have the honour to acquaint you, that on further examination of the hull of this vessel, and after trying the planking in several places, there was found a considerable portion of her timbers rotten and worm-eaten, particularly about the bends and counter, so much so that, after taking into consideration the expense and loss of time that would be incurred in refitting the vessel, together with the probability that the bottom would, on examination, prove worse than the upper portion of the hull; taking also into consideration the lateness of the season by the time the defects could be completed, I am of opinion, with all my officers, and likewise Captain Langlois, passenger, that the 'Eliza Cornish' is totally unfit and unsafe to proceed to England under such circumstances." So that, in fact, before the surveys were made, this gentleman had entirely made up his mind that the vessel was unfit to proceed to England at all.

Then, again, about the 6th September, Mr. Bawden consults the masters of other vessels, together with the carpenter of a vessel called the "Peri," and these persons wrote the letters marked B. and C. The one is the 24th August, merely as to the vessel being discharged; the other, which is marked C., is to the following effect:—"Agreeably to your request we have been

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on board the ‘Eliza Cornish,’ and have examined her. We report as follows. The outside plank very much worm-eaten; in fact, a perfect honeycomb. We shipped the copper, and found the plank as much worm-eaten as above it. Rudder-head sprung, and otherwise bad, requiring a new one. Inside survey: the apron very rotten. The breast-hook requires fastening, and we think there is very little substance to fasten it to. We found the ceiling wet through, and by cutting it found it rotten, and timbers very much so; and after considering the lateness of the season, together with the cost of spars, sails, cordage, and other things required, we are forced to say that she should be condemned as unseaworthy, and ever will be so.”

Now it is upon this extra-official survey that Mr. Bawden thinks fit to act, and not upon the survey taken by persons appointed by the officers at the head of the customs.

There is another document marked D, signed by Mr. Spooner, the master of the “Sea Fox,” in which he states his opinion. It is in the following words:—“I have sent in the report of the survey, which you have received, which was impartial, in which we expressed our opinion freely; in this I shall give my advice, if you think it worth the while to take it. The brigantine, ‘Eliza Cornish,’ the vessel in your charge, she is neither seaworthy, nor will she ever be. She could not be repaired in this port at any rate, as, by inspecting the outside plank, she must want a new bottom altogether; in addition to the report I should say to you, that if they did not condemn the vessel on that report, I should advise you to abandon her at once, after taking out the cargo that remains.”

I cannot help saying that, though it might be an instance of very laudable anxiety on the part of Mr. Bawden to get the very best information he could as to the state and condition of his vessel, and as to the steps proper to be adopted, either for repairing her, or having her, what is called in this letter, condemned; yet I think it must be apparent to all, that it is impossible to mix up these private and public surveys together; and least of all could it be contended that the course adopted by Mr. Bawden was justified by the surveys, or anything done by the order of the director of the custom house, except the order to sell, which was founded on the representation of Mr. Bawden himself.

Now I cannot help thinking that the result of the consideration of all this evidence is, there was, on the part of Mr. Bawden, a determination to sell this vessel, founded solely on private reports, which Mr. Bawden caused to be made, and not on the official reports. That Mr. Bawden acted according to the best

of his judgment for the benefit of all concerned, I do not doubt; but that this vessel was capable of being repaired at Horta, though, perhaps, at a very considerable expense, is most abundantly clear; for she was repaired by the new purchaser, and she did reach this country as early as the 28th November in the same year. The order for sale was dated on the 10th September; within little more than two months the vessel was repaired, and she brings a cargo to the port of Bristol.

I know it is sometimes contended that it is hardly fair to judge by the effect of subsequent transactions, and I agree in some measure with that argument; and if there had been any real doubt existing as to the capability of the repair of the vessel, I would not have rested on the mere fact that, subsequently, she was repaired and came to this country. But there is, it appears to me, the fact of the capability of being repaired proved by her coming to this country, which is in unison with all the official reports that took place at Fayal. It is in opposition to the private reports, and the surveys taken by Mr. Bawden; but it is in conformity with all that was intended to be done under the authorities in the island of Fayal.

Now I must observe upon another thing; the Court has no affidavit either from Mr. Minchin, the vice-consul, or from Mr. Lane, Lloyd's agent. This, I must say, is an absence of proof which there is great reason to complain of in this case. I must consider what these gentlemen did, and the course of conduct they pursued. It is a part of the important *res gestæ* in this case, what those who had authority in the island of Fayal did or did not do; therefore, though the means of forming an opinion on the evidence from which I am to judge are exceedingly defective, yet I cannot avoid pursuing the investigation. In a place like the island of Fayal, where there are many British marine, the person who represents her Majesty as consul or vice-consul is of course an important personage, to whom masters of ships might very properly revert in all cases of difficulty. Again, under similar circumstances, we all know there is no person whose advice is more to be relied upon in ordinary cases than that of Lloyd's agent; because, fortunately, it so happens there is hardly any port touched at in the world in which there is not an interest secured in this country.

I think, however, that I have enough to form the following opinion; namely, that these proceedings did meet with the approbation of Mr. Minchin; but there is no proof whatever that Lloyd's agent concurred in that opinion. It is stated that Lloyd's agent is far from approving; it is pleaded that, so far from approving of these proceedings, he offered to advance the

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The fact of subsequent repair is in unison with the official reports.

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requisite funds. A letter (a) has been annexed, which, supposing it is evidence, establishes that fact. I am inclined to come to the following conclusion with regard to that letter, it is admissible for certain purposes; but I am not satisfied that I can use that letter as legal evidence to prove that fact. I am not able to discover, with respect to that very difficult subject, what is, or what is not, evidence in correspondence of this description which takes place abroad, or that any very definite principle can be laid down on the subject; but it appears to me to be the safer course on the present occasion, not to consider that letter as any evidence of the fact, that Mr. Lane offered to advance the money. Suffice it then to assume, that the sale was made with the consent of Mr. Minchin, but not with the concurrence of Mr. Lane; the rest must remain in the obscurity in which the parties have left it.

I must now briefly advert to what was done. The vessel was refitted at an expense amounting, as stated at Fayal, to the sum of 929*l.*; but that included all the expenses incident to equipments, and I am by no means satisfied on the evidence before me, that the repairs necessary to be done to enable the ship to complete her voyage would have amounted to such a sum. I rely not entirely upon the estimate made by the survey, which was the sum of 300*l.*; but suppose I add to it 150*l.* or 200*l.* It is scarcely possible to suppose, if this estimate was made by a person of any competency to perform that duty, that he could be so mistaken as to estimate that at 300*l.* which would require 900*l.* It is also stated that a further expense was incurred at Bristol, amounting to 140*l.* This appears to me of no importance whatever in the solution of this case.

The sale was not valid by the law maritime, nor by the law of England.

Under these circumstances, assuming that the sale was *bond fide*, assuming that it was advantageous to all concerned, which is a great proposition to assume, and I cannot by possibility say it is really true, for I cannot say how the interests of the underwriters would be affected, and they are persons concerned; I cannot say what right the owners have to go against the underwriters, or what right they have to resist; but assuming, for the purpose of argument, that it was advantageous to all concerned, the question is, whether it was necessary? The capability of repairs being established, were there the means of

(a) This letter, addressed by Mr. Lane, Lloyd's agent, to Thomas Court, Esq., of Liverpool, and dated Fayal, 8th Sept. 1852, was annexed to the affidavit of Mr. Dean, the original owner. This part of the affidavit ran thus, "This deponent

says, in reference to such sale, this deponent annexes two letters marked A. and B., received at Liverpool from W. H. Lane, Lloyd's agent." At the hearing, Dr. Addams objected to its reception.

paying for that repair? Of that there can be no doubt; for to say nothing of hypothecation, the cargo consisted of specie in considerable part, and presented a fund ready at hand for the discharge of all repairs; a fund which was actually employed for much less important purposes, namely, the payment of expenses incurred at Fayal. Again, I say, without attempting to define what constitutes necessity, I cannot bring myself to entertain a shadow of doubt that where a ship is capable of repair, and where means exist, by hypothecation or otherwise, of paying for those repairs, no necessity, in the legal sense of the term, can be said to exist. If, then, necessity is an indispensable ingredient in a case of this description to warrant a sale, here it is not to be found, and, consequently, I am of opinion that, by the general maritime law, and the law of England, no legal transfer of the property in the ship took place by this sale.

I have not quite finished my task, but I am approaching to the conclusion of it. It remains to be considered whether I am justified in engrafting any exception upon this law from a consideration of all the other facts appearing in this case. It is contended, and very properly so, that this sale was legal according to the law prevailing in the island of Fayal, and that law is certified by two gentlemen said to be cognisant of it.

Now the law said to prevail in this island is, that the commissioners of the customs may sell the ship with the consent of the master where it is not worth the expense of repairing and outfitting—I use the words—but there must first be surveys thereof. What is meant and intended by this affidavit? This affidavit is in these words. I had better read it, for it is very important. After stating how well acquainted they are with the law, and the mercantile usage of the country, they state that, “When a ship of any nation whatever arrives damaged in the ports of this island, and it appears to the master, or any other person having charge of the command, that she may not be in a navigable state, it is customary, and according to the laws of Portugal, for the master, or the person having charge of the command thereof, with the aid of his respective consul, vice-consul, or consular agent, to request the commissioner of the customs of this island to direct one or more surveys of such ship to be proceeded to; and after those surveys have taken place, it is likewise customary and lawful, and the laws of this country authorise the same, to sell the said ship when it is not worth the expense of repairing and outfit.”

Now this opinion certainly appears to me to be framed to meet the precise circumstances of this case, because it does not state the law in any ordinary form; it states exactly what took

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Is it valid by the law prevailing in Fayal? and, if so, must it be supported here?

The proof of the law is deficient.

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place to a certain extent in this very individual case; viz. the master and other persons having charge of her may request the commissioner of customs to direct one or more surveys, and then order her to be sold, which is exactly what took place on this occasion. In one particular I do not know that this is very satisfactory, because, for what purpose are these surveys had? These surveys, I apprehend, are for the purpose of guiding the discretion of the commissioner: it is perfectly useless to have a survey, unless that survey is to have some operation and effect on the mind of the person who is to act upon it, and who directs it. Now can it be said for a single moment that these surveys are to be mere matters of form, and the commissioner is to decree a sale according to his mere will and pleasure? Then must not the true meaning be that if, after these surveys have been taken, it is made plain to the judgment of the commissioner that the said ship is not worth the expense of repairing and outfit, he is then to sell? Can any one say that this was the case after the surveys, when the surveys say that the vessel may be repaired, and that at the expense of 300*l*.?

I have thought it right to make these observations on this certificate, which comes in these terms without authority of any kind or description except the opinion of these gentlemen.

But, assuming
 the law proved,
 the Court can-
 not adopt it in
 opposition to
 the maritime
 law and the
 law of Eng-
 land.

However, for the sake of completing the principle of law, I will take the fact to be that the survey was properly made, and that the order for the sale was derived from these surveys ordered by the director of the custom house; and I will take it to be true that the ship was not worth the expense of repair and outfit; and I will take the law to be as stated to be by these gentlemen, and then I come to the question at once. Am I at liberty to adopt this law as an exception to the general maritime law, a law which would sanction and render valid the sale of any British ship in a foreign port merely upon a conjecture and estimate whether the ship was worth the expense of repairing and outfit, and that too without calling in the aid of a court of justice, but merely through the executive power of an officer in the customs? That such a law would be for the general convenience and advantage of all maritime nations, I am by no means inclined to admit; on the contrary, I am well satisfied that in principle and in practice, in practice too looking at this very case, it would be most injurious to the interests of all those concerned in commercial shipping, if I were to adopt any such principle; and I feel equally assured that it would be equally inconsistent with the present maritime law of the civilised world.

But then am I to adopt such a rule on the principle of the *lex loci contractus*? In what way does the *lex loci contractus* in the case of the sale of a ship entitle itself to be so admitted? If such general proposition could be entertained, the law relative to the sale of ships would be a law varying with the law of each individual country wherever the sale happened to take place; in fact, there would be no general maritime law at all, but a law to be inquired into in every case where the transfer took place in a foreign country. I should have one law to look for at Fayal, another in our own colonies, another in Demerara, another in Trinidad, another in French colonies, another in England.

Now, I know of no right which the purchaser of a ship in a foreign country, such ship not belonging to a subject of that country, has to call for the interposition of the *lex loci contractus*, save indeed in one case only where the title is derived from the decree of a competent court administering the law in its own jurisdiction, and by its decree conferring a title. Now, had the ship been purchased under the decree of a Court of Admiralty, directing her to be sold in a case within its jurisdiction, or the law of a court resembling our own Court of Exchequer, I should have hesitated long before I disputed that title.

Now, a word on that subject. It has been decided, as we all know in our courts, with regard to a British ship, if it should be condemned by a Court of Vice-Admiralty, that gives no title to the purchaser whatever. That is decided and fixed law. It is equally decided law in the courts of America, that a sale made in a case of a commissioner of wreck confers no title. A case (a) was cited at the bar in which a judgment to that effect was delivered by Mr. Justice Story, and a most admirable judgment it is; it exhausts the whole subject. But when we speak of the decree of a Court of Admiralty, it is quite manifest, from a consideration of all the cases, that the reason why a decree of the Court of Admiralty had not the effect of giving a title was from want of jurisdiction in the Admiralty Court to entertain the trial at all. Lord *Ellenborough* says in his judgment in *Reid v. Darby* (b), that he has made great inquiry: he says, he finds, though the practice has obtained in Vice-Admiralty Courts abroad of entertaining applications to examine whether a ship ought or ought not to be sold on account of damage for the benefit of all concerned; though that practice has prevailed, he states expressly that the result of his inquiry is, that Vice-

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"ELIZA
CORNISH."
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Sales of ships
by authority of
Vice Admiralty
Courts abroad
are invalid,
from want of
jurisdiction.

(a) The schooner "Tilton;" 5 Mason's (Amer.) Rep. 465.

(b) 10 East, 143.

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CORNIAH."

Judgment.

Seem, that
the Court
would hold a
sale made
under the au-
thority of a
court of com-
petent jurisdic-
tion, valid.

Admiralty Courts have no such jurisdiction. I think the judgments of common law proceeding on that principle are to be maintained on the principle and no other, because I wish to guard myself against this—supposing there was a Court of Admiralty existing in a foreign country, which by the law of that foreign country had a jurisdiction to entertain questions of this nature; I wish it to be distinctly understood, that I do not, under circumstances of that kind, say I would not respect the title conferred by such a Court of Admiralty; I do not say I would; it is a point hereafter to be considered and weighed; but I wish to guard myself against supposing that it does not give a title. I remember that, many years ago, when I argued upon the point in *The Attorney-General v. Norstedt* (a), the great question at issue was, whether or not the decree of a Court of Admiralty proceeding *in rem* was not binding on all the world, and so that forfeiture to the Crown could not bar it? It was decided in the affirmative, and I think properly so; therefore I wish it to be understood, that, in the event of a title being given by an Admiralty Court having jurisdiction, or a court of common law, I do not preclude myself from considering that to be a valuable title. Again, I should consider this: supposing a vessel was sold by decree of the commissioners, or the Court of Exchequer, for forfeiture, that I should hold a good title, if such a case could occur. Supposing a vessel sold in a foreign country under the law prevailing in cases of insolvency or bankruptcy, I should hold that also to be a good sale. But I wish it to be understood that I go on the ground, that nothing short of that appears capable of justifying a sale and making good a title.

The sale of a
ship forms an
exception to
the general
principle, that
the *lex loci con-*
tractus must
prevail.

Now having made these observations, there are very many other considerations which ought to be shortly adverted to, why I do not adopt that law. It is a general principle to which I give my unfeigned consent and approbation, that the *lex loci contractus* generally governs the validity of every contract. Its mode of execution may depend on the place where it is to be carried into effect; but with respect to the validity of a contract itself, it is a principle adopted by all writers on the law of nations, almost without exception as a general principle, that the *lex loci contractus* ought to govern individual transactions.

But the question is, Whether the *lex loci contractus* is always applicable, or whether there are not certain exceptions to that rule, and whether this case does not form one of those

exceptions; and without entering into it minutely, for it would occupy time, I will refer to a note to be found to the 286th sect. of the last edition of Mr. Justice *Story* on the Conflict of Laws. Now that note refers to several authorities; but there is a remarkable reference to a note which was written by Mr. Brodie, the very learned editor of Lord *Stair's* Institutes, in which this very point is discussed at considerable length, and he takes several distinctions, not having perhaps any particular case in view. All these distinctions do not apply to a case so very peculiar as that now under discussion; but there appear to me, according to his judgment, several reasons why the *lex loci contractus* is not always applicable. He says this: "A distinction is ever to be attended to between the case of a party casually entering a foreign country and that of one who resides in it: and the distinction is particularly strong in regard to an individual who, as master, has the charge of a vessel in a foreign port." Then he states he is under these circumstances likely to be ignorant of the law of the country, and not to be too tenaciously bound. Then there is another distinction, and that by far the most important. "The contract," says Mr. Brodie, "in such cases is made with the ship-master, who acts as the implied mandatory of the owner; and the effect of the transaction must greatly depend on the extent of his authority. Now it is true, that as a person who has been appointed to an office must be presumed to be invested with the usual powers, so restrictions upon the ordinary authority will not be effectual against another party who has not been apprised of them; yet it will be observed, that, since it is the duty of those who deal with an agent to make themselves acquainted with the extent of his powers, whether expressed or fairly implied from his office, so the presumed mandate here must be measured, either by some general principle of maritime law, or by the law of the country to which the ship belongs. Such a general principle of maritime law would of itself, though in a different way, tend in my apprehension to exclude the *lex loci*; but there is no such universally received principle, and the more positive exclusion of the principle of the *lex loci* is the consequence;" and then he goes on to state what the English law of hypothecation is, and how we should apply it.

Now I believe that, if this case had come under the consideration of courts of common law instead of the Court of Admiralty, a great deal of the matter to which I have addressed myself would not have formed part of their consideration. My con-

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The *lex loci contractus* never considered in such cases in the courts of common law,

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CORNISH.”
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viction is, they would have looked to that very argument used by Mr. *Brodie*, namely, what authority had the master to sell? They would have argued with regard to a ship all over the world, What power has the master to sell? They would have taken the extent of his power according to the definition of Lord *Tenterden*, and beyond that they would not have gone. They would have said, a contract as to a ship is contrary to other contracts: ships go all over the world; with regard to them the law of our own country must be primarily looked for: they would have said, the law maritime, so far as regards them, must prevail. That is my conviction of the mode the question would have been dealt with. I am confirmed in this, by seeing that, in the ordinary cases on this subject, the fact of the sale taking place in a foreign country, to a foreign purchaser, never appears to have had any effect on our judges; for in the earliest case (a), that before Sir *Matthew Hale*, cited in Lord *Tenterden's* book, he decided that the sale of a ship by the master did not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger. The incident of being in a foreign country forms a part of that judgment; and in looking, as I have with some degree of care, to the various judgments which have taken place in different courts on the subject of title to ships, I do not see that the fact of sale being in a foreign country has ever induced our judges to form any different opinion from that which they would if it had taken place in a British colony, though I must say there is one case in which I find it relaxed. It was formerly the law, the law within the last forty years, that if a sale took place in a foreign country from a case of necessity, yet if the Registration Acts had not been complied with, that sale was void. That law was laid down by Lord *Ellenborough* in the Court of King's Bench, and, on the highest authority, has been relaxed. I should have held that I was doing an act of injustice if I had bound a foreign owner by all the technicalities of the Registration Acts. I should have good right to bind him by the general municipal law, so far as it was conformable to the general maritime law; but I should have no right in a case of absolute necessity to bind him by the Registration Acts. I think, though it ought to be presumed that the purchaser should look at and inquire as to the authority the master possesses, the general authority, yet it never can be expected, with any show of justice or equity, that foreigners should, in a distant part of

(a) *Tremenheere v. Tresilian*, 1 Sid. 452.

the world, be supposed to know there were certain technicalities in the Registration Acts which would vitiate a sale otherwise valid: let it be understood I speak of a case when it would be otherwise valid.

Now there is another matter I will shortly advert to before I terminate this discussion, and that is, with regard to cases of hypothecation.

Now I conceive that in cases of hypothecation the fair result to be drawn is, that all our courts which have had to consider that subject have never deemed themselves bound by the law of the country where the bond was given. It is singular, seeing the great number of cases which have occurred, and the points that have arisen, that this should not have been matter of discussion, because the great number of bonds that come under our consideration are bonds not given in British colonies, but in the ports of foreign countries; yet in no instance has it been prominently brought forward except incidentally in this way. It has been said, Why, by the law of nearly the whole of Europe,—sometimes, even, the proposition has been pressed so far as to say, by the law of all civilised states except England—you have a right to a lien against the ship for any thing done on her behalf in the way of repairs and furnishing necessities; and that you might do more than that, you might, though the ship was not in your possession, you might take her in possession, and sell her to liquidate these demands. This has been alleged particularly in the case of "*The Augusta*," *De Bluhn* (a), as a ground for bottomry bonds.

Now it is rather difficult to say how that ought to operate: it never has been acknowledged to be a law that is binding in any degree upon the courts here; but I have always myself considered, that where there was an imminent degree of danger of a ship being so sold, unless the master was enabled to get money to prevent the sale, that it certainly was a case which to a certain extent I might rely upon as justifying the taking of money on hypothecation; not that I acknowledge the law as binding upon me, but it constitutes a part of the necessity of the master. These are two distinct and separate propositions. Now in no case that I am aware of—I do not say the subject may not have been discussed and agitated, but I am not aware of a decision upon it. In a case appealed from this court not long ago, the "*Bonaparte*," it formed no part of the discussion or decision.

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otherwise
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CORNISH."
Judgment.

nor in the Admiralty Court in questions of hypothecation.

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In present case, too, there appears to have been no communication to the owner, no danger of the cargo's deterioration, and but little danger to the ship from her position.

I may, however, further observe in this case, no attempt appears to have been made to communicate with the owners of the ship at home, though such a step was not very impracticable on their own showing. Even in the case of bottomry, such communication ought, if possible, to be attempted; and where it is practicable, and not done, even a foreign merchant advancing his money we know is not entitled to recover.

Here, too, there is no danger as relating to the cargo. The valuable part of the cargo was not of a nature to be deteriorated by keeping; and another consequence of such a sale as this is, that it entirely destroys, and may disturb, all the rights subsisting between the owners of a ship and the owners of a cargo. We know that has taken place in several instances. I say nothing of the insurers and the insured, because I have already adverted to them.

Another proposition was made, — that there was danger of the chance of the ship being damaged in the place where she lay. That danger is set forth here, and may have existed to a certain extent; but all the facts in this case satisfy my mind that this was not a substantial reason for sale; I therefore discard that from any further consideration.

Possession decreed to the original owner, with costs.

Now, looking at the whole of the case, I have come to the conclusion, that I cannot adopt the *lex loci contractus*; and, if I reject the *lex loci contractus*, it was not the sale of a ship from necessity which alone could justify such a disposition of it. I am therefore bound to hold that this sale was invalid, and to decree possession to be delivered over to the original British owner. (a)

(a) The law appears less severe in America, for Mr. Justice *Story* says, "I feel the less difficulty in having arrived at this conclusion, because, if I had felt it my duty to decree possession to the libellants, grounded upon the invalidity of the sale, the decree must have been upon the terms of making all due allowances to the claimants, for the expenditures of the original purchasers in getting off the vessel and repairing her. This is the case of a clear *bonâ fide* purchase, under circumstances calling for no inconsiderable indulgence, even if the strict law had been against the title. The general practice of the Admiralty in all such cases is to restore possession upon making compensation for all

meliorations by the purchaser. (b) It is an equitable principle, analogous to that which is constantly acted upon in courts of equity, and probably borrowed from the same common source, the civil law. And if meliorations ought to be decreed generally, *a fortiori*, the actual disbursements and expenses ought to be allowed which were incurred to deliver the vessel from her peril; for they are in the nature of salvage. Where, indeed, the title is not only invalid, but the transaction is tainted with fraud or ill faith (which is not pretended in the present case), the rule would be different;" *The Brig "Sarah Ann,"* 2 Sumner's (Amer.) Rep. 220.

(b) See the "*Perseverance*," 2 Rob. R. 239.; "*Nostra de Conceicao*," 5 Rob. R. 294.

Dr. Haggard. And the costs, sir?

THE COURT. Yes; my only reason for giving costs is, it is now laid down by all the courts, that costs are to follow the results of the case. At this moment it is in agitation by the Privy Council, that in every case where the appellants succeed, the respondents are to be condemned in the costs of the appeal. Therefore I am bound to go on that principle.

Proctors for the original owner, *F. Clarkson & Son*; for the purchaser, *J. K. & G. Burchett*.

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otherwise
“ELIZA
CORNISH.”
Judgment.

THE “E. U.”

THIS was a cause of salvage promoted by the crew of the Broadstairs life-boat, and the owners and crews of the luggers “Ondine” and “Ruby,” against a vessel called the “E. U.” Of the facts of the case there was but little dispute. This vessel sailed on the 13th December last from Antwerp, bound for Liverpool, and on the 24th, when off Brighton, met with a severe gale from the S.W., which obliged her to bear up for the Downs, where she anchored on the 25th. The gale increased, and about 2 o’clock A.M. of the 27th a second anchor was let go, but at 5 A.M. she drove, with both anchors down, broadside on towards the Brake Sand, upon which she struck heavily about 6 A.M., the sea flying over the maintop. The double-reefed foretopseail was set, but was soon blown to pieces. At 8 o’clock she beat over the Brake, and, on sounding the pumps, was found to have three feet water in her. At 9 o’clock she was near the Elbow Buoy drifting, when the Broadstairs life-boat with twelve men came alongside. Seven of them remained to assist her, while the rest went ashore in the life-boat to bring off an anchor and chain. Those on board made every exertion, and at length succeeded in wearing the ship’s head towards the land; but finding the water increasing in the hold, and the ship very unmanageable, they signalled to the “Ruby,” a Margate lugger then in sight, and requested her master and crew of five hands to stay by the ship, which they did until about half past twelve, when the life-boat’s men, as well as the master and crew of the “E. U.,” abandoning the hope of saving her, got on board the lugger, proceeded to shore, and reached Margate in safety. In the mean time the five men who had returned to shore in the life-boat had reached Ramsgate, procured an anchor and cable, and put them on board the lugger “Ondine.” They were afterwards joined by

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June 7.

Salvors having made great exertions to save a ship and cargo, were at length, with her crew, compelled to abandon her. She was afterwards found, and saved by a steamer. — Held, that the original salvors were entitled to salvage reward under the circumstances.

Statement.

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some of the others, who had come overland from Margate, and, together with two of the "Ondine's" crew, proceeded in search of the ship, which, after some time, they discovered being towed by a steamer. The lugger accompanied her to Margate, and there put the anchor and cable ashore. For these services the owners had tendered 200*l.*, which was refused. They alleged in defence that they had already paid 1,650*l.* as salvage to the master, owners, and crew of the steamer, and *denied that the parties proceeding in this case had rendered any effectual service whatever towards the saving of the ship.*

Dr. Addams and Dr. Twiss appeared for the salvors, and Dr. Bayford for the owners.

Judgment.

DR. LUSHINGTON. Before the Court can decide upon the sufficiency of the tender in this case, it must have some idea of the value of the property. The original value was 4,995*l.*: various deductions have been claimed by the owners, but I apprehend I shall do no injustice if I estimate its value, after reasonable deductions, at between 2000*l.* and 3000*l.* The owners have tendered 200*l.* as a sufficient remuneration for the services performed.

The principle of salvage is to reward exertions which have been successful in saving property. Exertions therefore, however meritorious, which have not been successful in any degree, cannot receive salvage reward.

In the course of the argument certain points, worthy of great consideration, and attended with no small degree of difficulty, have been touched upon by counsel. I mean this, What is the principle the Court should adopt where services have been rendered, but have proved inefficient; and things have been done to a ship in distress which hardly partake of the nature of salvage service, and are scarcely productive of any benefit to the ship? In order to make my meaning clear, I will suppose a vessel in distress, and an order sent to put an anchor and cable on board, and that that is done; but that afterwards, from the violence of the weather, the vessel is carried away and lost; the service, however, is such as must be paid for whether the vessel is lost or not. The Court is always in the habit, when awarding remuneration for services of this description, of considering the difficulty and danger attendant upon performing them; and I know that many instances have occurred at Deal, in which putting an anchor and cable on board has been considered a service of the greatest merit. The case I particularly remember came here on appeal, where the commissioners had awarded 120*l.* for this service; and I thought it my duty, according to the best of my judgment, to alter that decree by reducing the award. That led to a remonstrance from the commissioners, who thought, perhaps, that I was not so well aware of the difficulty of putting an anchor and cable on board

as those who were on the spot. Whether I was right or wrong in that particular instance, the circumstances have ever since strongly impressed themselves upon my mind.

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Suppose another case:—a vessel is fallen in with in the Bay of Biscay in a disabled state; she is brought to Plymouth, and then, in consequence of the weather being tempestuous, or other circumstances, she is altogether abandoned by the salvors, who are on board of her. I apprehend that if, in a case of that kind, another vessel comes up, and finally brings the disabled ship into a place of safety, it is by no means to be laid down as clear law that the original salvors are not entitled to some reward; because, in fact, they would have brought her from a place where destruction was certain, to a place where, though there was considerable danger, there was a chance of salvation.

But there is a third case, in which parties are entitled to no compensation at all; that is, supposing they go out at the risk of life, and make the most meritorious exertions, and yet do nothing successfully towards saving the vessel and cargo in the slightest degree. The Court cannot, I apprehend, under those circumstances, give any salvage reward whatever; because the very principle of salvage is, to give reward for exertions which have been successful.

These circumstances I have thought it right to mention, from the course which the argument has taken, and in some degree from the facts stated in the pleadings. I will now proceed to the consideration, what the services were in the present case, and under what principle they range themselves.

There is no doubt that this vessel of 435 tons burthen was in a state of very imminent danger. The weather is represented to have been the most tempestuous experienced for many years. The men on board the life-boat saw this vessel in a state of danger, with a signal of distress hoisted; and I must say that the very greatest credit is due to those who went on board the life-boat, and exposed their lives to what I consider most serious peril, for the purpose of rendering assistance to men whose lives were in danger, and to the property of which they were in charge. I think I could scarcely exaggerate the merits of those who encountered these risks. Now, of the facts there is no denial. The question is, what resulted from the facts? They found the vessel in a state which I need not describe, and adopted measures for her preservation. These were, in the first place, to bring her head to the N. W., though that was not effectual; in the second place, to send the life-boat for an anchor and cable, because the vessel never could be safe until

This vessel was in great danger, and the exertions of the claimants were highly meritorious.

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she had them on board. While some of the party went away for this purpose, the remainder used every exertion in their power to save the vessel. They found the water in the hold increase from six feet to nine, and all their exertions were unavailing, so that there was imminent danger to the lives of those on board. They again wore the ship, and, they say, with some success, but it could not have been very great. After a time, when the danger had so increased that it would have been inconsistent with their duty to themselves to incur further risk, the crew of the vessel, together with the master and the crew of the life-boat, left the ship. In this I hold them to be fully justified. For it never can be contended that life is to be sacrificed for the sake of property, however valuable. On reaching the shore at Margate in the "Ruby," they proceeded overland, and found that the "Ondine" had been hired to bring out an anchor and cable; and then, with a perseverance which is in itself exceedingly praiseworthy, they go in search of the vessel. In the mean time she had been taken in tow by a steamer, which had accidentally fallen in with her. I apprehend there can be no doubt that the "Ondine" is entitled to be paid for taking out an anchor and cable of no less than 20 cwt. The "Ruby," however, was the mere vehicle in which the persons were carried, and I cannot say that she has, strictly speaking, any claim for salvage. The learned counsel for the owners has said, with great propriety and great force, Take the service altogether, what has it to do towards completing the salvage of the ship? The answer is, in my opinion, this: No one can tell the precise effect of the head of the vessel being put to the N. by those on board the life-boat. It may have been productive of great benefit, or, on the other hand, it may not have been in the slightest degree instrumental towards the ultimate safety of the vessel. Looking, however, to the whole case, and especially to the intrepid manner in which the salvors went on board the life-boat, and the general maritime benefit in inducing persons to go on in extreme difficulty to save the lives of those in danger, I shall overrule the tender, and give the sum of 300*l*.

But it is impossible to say what was the precise result of those exertions, and what not. The Court will therefore hold them entitled to reward.

Proctor for the salvors, *Rothery*; for the owners, *Gostling*.

THE "SIR GEORGE SEYMOUR." (a)

THIS was originally a cause of damage by collision, promoted by the "Victoria" against the "Sir George Seymour." The "Victoria" was run down on her outward voyage to Trinidad. She was compelled to put into Corunna, whence she proceeded to Trinidad. The case was argued on January 22nd, 1851, and sentence pronounced in favour of the "Victoria." This sentence was affirmed on appeal, by the Judicial Committee, who remitted the cause. It was then as usual referred to the registrar and merchants, to ascertain the extent of the damage, and the sum due to the "Victoria." The sum claimed was 705*l.* 2*s.* 5*d.* The registrar and merchants made their report, disallowing various demands of the owners, to the amount of 243*l.* 18*s.* 7*d.* To this report the owners of the "Victoria" objected.

DR. LUSHINGTON. This was originally a case of damage, in which the owners of the "Victoria" succeeded against the "Sir George Seymour." The amount of damage was referred to the registrar and merchants, and their report has been objected to. The sum in dispute is 243*l.* 18*s.* 7*d.* The demands disallowed were: part of the repairs done in London; yellow metal; part of the ropemaker's account; part of the block-maker's bill; the charge for Lloyd's surveyor; part of the account for canvas supplied to the vessel; and part of the demurrage. I need hardly say that, where the registrar and merchants have made a report, the presumption is in favour of the report so made by the officers of the Court; because they are persons of skill and experience, and disinterested between the parties. When, however, an objection is taken, it is a duty which the Court cannot abandon, to consider the report and the objections thereto, and to form the best opinion it can as to the accuracy of such report, or the validity of the objections. There are, indeed, in the present mode of proceeding very great difficulties with which the Court has to contend in discharging that duty. It is necessarily without that knowledge which is peculiarly requisite to the ascertaining the truth in such matters. For instance, in this case there are questions which require the knowledge and skill of a shipwright or surveyor of shipping, and other questions calling for the practical experience of a merchant. To none of these qualifications, even in the least degree, can the Court pretend. All that the Court can do is, to weigh the evidence in the case. If the Court had the same

1853.

THE HIGH COURT OF ADMIRALTY.

March 24.

Objection to the report of the registrars and merchants, in a cause of collision. Practice of the Court. Assessors appointed to assist the registrar and merchants in the reconsideration of their report, the Judge himself being also present in the registry.

Judgment.

Presumption in favour of the report.

The Court labours under great difficulties in discharging its duty of reviewing the report of the registrar and merchants.

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"SIR GEORGE
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evidence, and none other, than that which was before the registrar and merchants, it might be enabled to form something of an opinion, however imperfect for want of their practical knowledge and experience. But how stands the case? First, I have not before me the whole evidence on which the registrar and merchants proceeded. According to the practice, much passed *viva voce*, of which no record is kept. Nor is this all. I have, on the present occasion, no less than seven affidavits from one side only, which never were before the registrar and merchants at all, and two affidavits on the part of the owners of the "Sir George Seymour." Then, what am I doing? I am reviewing a report. I am called upon to say, whether a report be right or wrong, without some of the evidence on which it is founded, and with evidence on the other hand, unknown to those who made it. A more anomalous undertaking, or more impracticable to be well executed, no Court was ever compelled to embark in. For this most inconvenient proceeding, I will use all the means in my power to obtain a remedy; and it is the more necessary to do so, as these reports upon damage are every day increasing. One remedy will be, to obtain a power for the registrar and merchants to examine on oath, and to confine the evidence as far as practicable to what can afterwards be brought before the Court.

But be this as it may, I must come to some conclusion in the present case; and the parties must not be surprised if I am driven of necessity to resort to a course for which, perhaps, strictly, there may not be any precise precedent. I consider that I am not in a condition to form any positive opinion, as to whether the report be correct or not. Suppose I uphold the objections; it might be that the registrar and merchants, if they had had the same evidence as I have, would have made a different report; and then I should be deciding originally, that which ought only to be decided upon appeal. I should be saying that the registrar and merchants are wrong upon evidence they never had an opportunity of considering. I am of opinion that no evidence should come before the Court which was not before them.

After commenting upon the conflicting evidence, the COURT said:— The course I shall adopt is this, for I will attain justice if I can, whatever trouble it may involve. If the owners of the "Victoria" assent to the proposition, I will refer back to the registrar and merchants the whole of the papers now before the Court, and will select, without communication with them, two persons, one a merchant, the other a surveyor of shipping, to consider, with the registrar and merchants, all these documents

In furtherance of justice, the Judge will select skilled assessors to assist the registrar and merchants in the reconsideration of their report, and even attend in the registry if, if ne-

and evidence, with power to examine the master of the "Victoria," if he be forthcoming, as he should be. Then, upon this further report, I shall come to the best decision that I can, reserving the question of costs for the present. If it be necessary, I will attend myself in the registry when the examination goes on.

If the owners of the "Victoria" decline acceding to this proposition, I must overrule the objections, and for the following reasons: because, though I think the evidence produced by them has created great doubt, at least, in my mind, whether the report be well founded or not, yet that evidence has not satisfied my judgment that the objections are established by competent proof; and I cannot overrule a report unless the affirmative of the objections be distinctly established.

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THE
"SIR GEORGE"
SEYMOUR."
Judgment.

The owners assented to the suggestion of the Court, and a further investigation having taken place in the registry, at which the learned Judge himself attended, the matter came again before the Court for its final decision.

June 7.

In the course of his judgment, DR. LUSHINGTON made the following remarks upon the practice of the Court: I think it right to make one or two observations as to the course which is generally adopted in making these reports, and the manner in which they are brought under the cognisance of the Court. In theory, perhaps, they are not altogether defensible; but I believe that in practice they have worked exceedingly well, and justice, for the most part, has been done as speedily and as effectually as it could be done in any other manner.

Judgment.
Practice of the
Court.

The damage is referred to the registrar and merchants to ascertain the amount and degree; and it must frequently happen that questions of no small difficulty are presented for their consideration; for they have to ascertain, not merely the expense of the damage which is done by the collision itself, but to calculate the losses which have happened to the owners in consequence of the disappointment of the voyage, called sometimes demurrage, though not strictly and properly so, and other considerations of the like nature. These are considerations involving frequently questions of great nicety and great difficulty, more especially when there is no possibility of those who have to judge the case having a personal inspection of the property damaged.

The mode pursued by the registrar and merchants is not only

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The mode pursued by the registrar and merchants is not only

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to have affidavits, but the attendance of persons concerned on the one side and on the other, who they think can throw any light on the question. They then make their report, and I have always found that these reports have been made with the utmost care and caution. I apprehend that, upon principle, as well as for other reasons, it is the duty of the Court to be very cautious before it overthrows any report so made, unless there be an overpowering case, which shall satisfy the mind of the Court that justice has not been done. In other words, the presumption is strongly in favour of the report.

When, however, cases do come under the consideration of the Court, it has the affidavits made before the registrar and merchants, and of course it can form its own opinion upon them, exactly in the same way as they can form theirs; but the Court loses the benefit of the oral communications which take place between the registrar and merchants and the parties concerned; — of those *virâ voce* explanations which may be of the utmost utility to ascertain the truth of any particular item. So far the Court is placed in a worse position than they; but in many cases I have affidavits which were never before them at all.

I mention these matters because I think it desirable that they should be well known; but, notwithstanding these apparent anomalies, I am perfectly convinced that in great part justice is entirely done to the parties concerned.

Taking into consideration the affidavits produced in the present case, and being reluctant to pronounce any judgment without my own mind being perfectly satisfied of its truth and justice, I resorted to what is, perhaps, the first instance in which such a step has been taken, but one which I do not repent. I determined to go to the registry, and, with the registrar and merchants, investigate the case, and obtain the assistance of one of her Majesty's surveyors of shipping, and of a merchant of very high character, so that I might secure the very best advice I could before I came to a final decision. All that I have now to do is, to state the decision to which I have come.

The learned JUDGE then referred to the various items in dispute, in some cases upheld, in others overruled the objections taken, and gave the costs incurred by taking the objection. (a)

(a) With regard to the costs of reference to the registrar and merchants, the Court stated the principles on which it proceeded in the "*Nimrod*," (May 25.), thus,—"I am of opinion that there is a distinction between a reference to the registrar and merchants in a question

of bottomry and in one of damage. With respect to bottomry, persons who go to a reference ought to be provided with the charges which they mean to prefer. These are charges already incurred, disbursements made; and the accounts ought to be fair and accurate; not binding

Proctors, for the "Victoria," *Rothery*; for the "Sir George Seymour," *Deacon*.

1853.

THE
"SIR GEORGE
SEYMOUR."

Judgment.

them down too tightly in that matter. I should always be disposed, in questions of bottomry, wherever I find that, in a reference to the registrar and merchants, a considerable sum has been demanded over and above that which the bondholder was fairly entitled to, to compel him to pay the expenses of that reference. With respect to cases of damage there is this difference: it is difficult to lay down a positive rule whereby you can ascertain the damage done to the ship or cargo in consequence of collision. It frequently happens that there are many items to take into consideration, of which the person who has received damage cannot make a precise estimate, and which may be fair matter of dispute and discussion before the registrar and merchants, and which discussion the person so receiving damage, — the person damnified in the case, considering its nature, — is fairly entitled to raise and complain

of, at the cost of the wrongdoers. Yet I am by no means disposed to come to the conclusion, that it is the right of a party receiving damage to make preposterous demands, exposing the other side to considerable expense. Wherever the Court finds a party so conducting himself with respect to items preferred in a claim for damage, I think, in justice to the other party and the public, — for the public have an interest in justice being administered, — I ought to take cognisance of it." (a) In accordance with these principles, the Court in that case condemned a party in the costs of reference as to four extravagant items, disallowed by the registrar and merchants, and amounting to 1109*l.*; and in the case of the "Cynthia Ann," (June 21), where the sum claimed was 275*l.*, and the amount allowed only 91*l.*, condemned the party in the whole costs of the reference, and of the motion to that effect.

(a) 17 Jur. 768.

THE "JULINDUR." (b)

MR. E. R. ARTHUR, the owner of the "Julindur," having become bankrupt, the master, Mr. H. Burns, under the 7 & 8 Vict. c. 112. s. 16., proceeded against the vessel for his wages. The mortgagee of the vessel appeared in defence of his own interest. The question being entirely one of account between the master and owner, it was referred to the registrar and merchants. They made their report to the effect that on the balance of account, the master, instead of having any claim upon the vessel, was a debtor to the amount of 271*l.* 17*s.* 7*d.* To this report the master took objections. The two principal items in

(b) Reported by Dr. Spinks.

THE HIGH
COURT OF
ADMIRALTY.

March 24.

The master's lien on a vessel, when the owner is bankrupt, is limited to services in that vessel. A balance due from the owner to the master for services in another vessel disallowed.

The Court, in the exercise of its equitable jurisdiction, may give a party the opportunity of further proof.

1853.

THE
"JULINDUR."
Statement.

dispute were 200*l.* 4*s.* 5*d.* balance of a previous account due from the owner to the master, and 803*l.* 1*s.* 10*d.* for bills dishonoured. These items in the master's account were disallowed.

Dr. *Addams* appeared for the master, in opposition to the report, and Dr. *Bayford* in support of it.

Judgment.

DR. LUSHINGTON. I shall be able to dispose of this case in a few words. This is a case of objection to the report of the registrar and merchants. It was originally a claim for wages made by the master; the wages were pronounced for, but a reference was made to the registrar and merchants in order to ascertain whether, after taking the accounts, anything was due or not. The report was, that no wages were due; to which the master has taken objection, and has brought the case under the consideration of the Court; and of course the first consideration is, whether this objection is sustained by evidence.

[THE COURT, having examined and confirmed certain allowances as against the master, proceeded:—]

Now the master's claim for sums which the registrar and merchants disallowed stands on a totally different footing. The question which I must now resolve is, not only whether they were justified in the step they took, but whether, according to principles of justice, which the Court is bound to administer, I ought to open the report with regard to the sums.

The sums are as follow:—"Balance of previous account, 200*l.* 4*s.* 5*d.*" "Bills to Lyall, Scott and Co. dishonoured with charges and re-exchange, 803*l.* 1*s.* 10*d.*" "A small sum of five guineas to an accountant." And lastly, "Interest on a previous account, 25*l.* 0*s.* 5*d.*" With respect to these sums it is stated by the master as to the first item, viz., the balance of a previous account for a former voyage, which ended in the month of October, 1849, that all the accounts were handed to Mr. Arthur in the course of the same month and were never objected to. The answer to this is, that no vouchers were ever produced at all; and certainly, if no vouchers were produced of any species or kind, it would be next to impossible that the registrar and merchants, in the discharge of their duty, could have allowed these sums, however justly they might have been due. There is an affidavit produced from Mr. H. Burns with an account annexed, which account was never before the registrar and merchants at all, though why it was not, I am utterly unable to state; but it is an account which brings it to the amount of 200*l.* 4*s.* 5*d.*; an account between him and Mr. Arthur, who is the owner of the ship, but now become a bankrupt.

The registrar
and merchants
cannot allow
claims without
vouchers;

In my opinion the registrar and merchants acted rightly ; in the first place they had no account, in the second, they had no vouchers whatsoever upon which they could rely ; but it will be another consideration whether I may not give this master some opportunity of establishing these claims, which in point of fact are not negatived. They are not proved by competent evidence, but they are not negatived in the case.

I now come to a very important item. There are certain bills drawn on Scott, Lyall, & Co. ; bills drawn on the owner, as is evident, for the purchase of coals at Sydney, which coals were sold at a considerable profit at San Francisco, and 5000 dollars were sent home. No account was rendered of this, but the transaction does not seem to have demanded it.

[THE COURT, having commented upon the affidavits, which showed that the master had forwarded 1000*l.* to meet these bills, that the 1000*l.* had come into the hands of the assignees of the bankrupt, and that the parties interested were about to sue the master on the bills, then proceeded : —]

Now, it appears to me that the registrar and merchants in this respect as well as in the other, acted perfectly correct, in the absence of all vouchers and documents, in rejecting these demands ; but I cannot but feel that the facts themselves are not negatived ; either that the owner was indebted in the sum of above 200*l.*, or that the bills were drawn for the coals by the master, on the owners, or that the assignees are, in fact, in possession of the very profit made by this bargain.

Now, it would be a measure of in-equity, I will not say illegality, if the master should be deprived of these sums which are *bond fide* due to him in the account. I am of opinion, therefore, this being a bankrupt estate, where the property belongs to the creditors, that it is necessary to require strict proof, and that, as there are no vouchers, the affidavit of the master is not sufficient ; but it appears to me that I may take the following step : I will allow the master, if he thinks fit, at the risk of costs, to examine Mr. Arthur, the owner, before the Court here. I have not power to send him before the registrar and merchants, but I have power to send for him to examine him here. If he thinks fit to incur the expense, and run the risk of costs, he shall examine Mr. Arthur, to prove these demands, which are not denied, and also call for the accounts of the mortgagees and assignees ; for I really think the registrar and merchants, for some reason which I cannot conjecture, were left without the means of coming to a satisfactory conclusion on the point. What they did, I think, is perfectly right ; but I think the Court in the exercise of its equitable jurisdiction, is entitled to

1853.

THE
"JULINDUR."*Judgment.*

but the Court may, in the exercise of its equitable jurisdiction, allow the party to supply the deficiency of proof by producing further evidence.

The master allowed, at the risk of costs, to examine the bankrupt owner before the Court, to prove the items for which vouchers were wanting.

1853.

THE
"JULINDUR."
Judgment.

inquire, whether these demands on the part of the master cannot be established by adequate evidence, through the medium of Mr. Arthur, who must be cognisant of the facts, or by other evidence, and by calling for the accounts. I will give the master the opportunity of obtaining the evidence. I do not overrule the report: I hold my hand.

June 10.

The matter was again brought before the Court, and Mr. Arthur, the owner of the ship, Mr. Gillespie, the clerk to the official assignee, and Mr. Bottomley, a shipowner, were examined *vidâ voce*, on behalf of the master; and Mr. Atkins, the holder of the bills, on behalf of the mortgagee.

Judgment.

The Court has scarcely sufficient power under the Act of Parliament to administer full and substantial justice.

DR. LUSHINGTON. Before entering on the proceedings in this case, I think it is expedient to advert in the first instance to the authority under which the Court acts, and to see what limitations are necessarily imposed upon the power of the Court; and if it should so happen, unfortunately happen, that the Court is, in some instances, incapable of working out the whole consistently with justice, the blame must lie upon the Legislature which passed the Act, and not upon the Court which administers it.

7 & 8 Vict.
c. 112.

Now, it pleased the Legislature to pass an Act, entitled "An Act to amend and consolidate the Laws relating to Merchant Seamen," and to insert in that Act, for the first time, a provision relating to masters' wages, and that in these words: "That all the rights, liens, privileges, and remedies (save such remedies as are against a master himself), which by this Act, or by any law, statute, custom, or usage, belong to any seaman or mariner, not being a master mariner, in respect to the recovery of his wages, shall, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master mariners, in respect to the recovery of wages due to them from the owner of any ship belonging to any of her Majesty's subjects." (a)

The consequence of the Legislature passing this Act of Parliament was, that it imposed upon this Court, to which the jurisdiction was given, the necessity, in all cases, of entertaining the claim of the master to his wages, where the owner had either become insolvent or bankrupt. Nothing was mentioned in the Act but the word "wages," and I am to administer the law exactly in the same manner as I administered it antecedently to the passing of the Act with regard to seamen.

1853.
 THE
 "JULINDUR."
 Judgment.

Now, with regard to seamen, it is well known that the way in which we always proceeded in these cases was, to deduct the advance made to them on account of wages and to deduct also anything which might have been received in the nature of slops, and to give the balance. These were very simple matters, never requiring a reference to the registrar and merchants, but were decided on the spot, and, generally speaking, without any objection on the one side or the other; but when we came to consider the amount of wages due to masters, it assumed a very different aspect; because it is well known that the ordinary practice in ships, particularly ships of any large size going distant voyages, is, that the master is in the habit of expending on account of his owner very considerable sums of money, and receiving credit to a very great extent. Then the Court was placed in this predicament. I must either have decreed to the master the whole of his wages, without regard to anything he received, or I must go into the question of accounts. Now, anything more unjust to owners than to compel them to pay a master his wages, without looking to what he had received, cannot well be imagined; the Court therefore found it necessary to go into the accounts; but yet the Court is placed under difficult circumstances, because the Court has no jurisdiction, under the Act, to give the master one shilling beyond his wages, though 1000*l.* might be due. Again, on the other hand, if it be found that 1000*l.* are due from the master to the owners, the Court can do nothing in that case. All the Court can do is, to see what certain sum is due in the nature of wages, and, if the master has received certain sums, to make the deduction. That is the state in which the Court is placed, and the law which it has to administer.

In this particular case the action is entered in the usual form as against the ship, and an appearance is given on behalf of the mortgagee of the ship; and no doubt the mortgagee is fully entitled to come before the Court, and ask to protect his own interests, and it would be an act of injustice to allow a claim against a mortgagee which could not be substantiated against the owner, as owner of the ship; that is to say, I must take the account with regard to a mortgage, in exactly the same manner as I must have taken it, provided I could have had the owner before me to protect his own interest in the ship.

In this case, with a view to the saving of expense, it was at once determined to go before the registrar and merchants for the purpose of ascertaining what was due to the master, if anything was due, and to let the registrar and merchants take the whole of the facts into their consideration. They pro-

1853.

THE
"JULINDUR."
Judgment.

nounced that the balance of account was against the master prosecuting the suit, and not in his favour.

To this report of the registrar and merchants, objection was taken on behalf of the master, and that objection was argued before the Court; and it appeared to me that it was rather hard on the master, supposing these items to be justly due to him, to be deprived of the benefit arising from those items, and to be left debtor to the ship, if in fact they were truly due, and the deficiency was merely a want of proof at the time. Not that I in the slightest degree doubted that the registrar and merchants had, from the materials before them, decided rightly; because of course they can never allow a demand, unless that demand is substantiated by proper vouchers or by proper evidence. It is one thing, and a totally different thing, to take admissions against a man himself, that a sum is due; but it does not in the slightest degree follow that, because you take such admissions of particular items, you are to allow on the other side an account which is not sufficiently vouched or established by competent evidence.

This, however, related to two, and only to two items. These I allowed to become the subject of discussion, and to be proved by evidence, if the master had evidence to substantiate them. The one was a balance of a previous account amounting to 200*l.* 4*s.* 5*d.* Now, no doubt if it had appeared by satisfactory evidence that there was due to the master on account of a previous voyage in the *same ship* the sum of 200*l.* 4*s.* 5*d.* I could have allowed it in his favour; and for an obvious reason; because he would be perfectly entitled to sue for wages on a former voyage. Therefore I must take that into consideration. But when I come to look at the evidence of Mr. Arthur, though his memory failed him in the first instance, he not being able to state specifically whether the master had been one or two voyages in this vessel, yet when I put the question to him how the "Julindur" was employed, and in whose command, it was perfectly satisfactory to my mind that the voyage for which the master is now suing is the only voyage for which he has a claim. Mr. Arthur stated that he purchased the ship in 1847; that she went to the East Indies and back, under the command of Captain Howlett; that she then went, I think, to North America and returned; that Captain Howlett died; and then it was that Mr. Burns was appointed commander. What can be more satisfactory than this? because Mr. Arthur proves what was the date of the purchase and the date of the employment of the vessel from the commencement to the end. I am therefore perfectly

Balance of account for a former voyage in the *same ship* might be allowed, but, in a different ship, it cannot.

satisfied in my own mind that the demand of 200*l.* 4*s.* 5*d.* cannot now be inserted in the account.

With regard to the other sum, these bills were drawn in New South Wales, and for what they were drawn does not very distinctly appear from any evidence before me; but I will presume them to have been drawn on account of the purchase of a cargo of coals, which were subsequently carried to San Francisco, there sold, and produced a benefit to Mr. Arthur, the owner of the cargo as well as the ship. I take that to be granted for the purpose of argument.

Now it appears to me impossible to allow this in the account of the master, and for obvious reasons: first, I have not the slightest proof whatever that he had the authority of the owner to purchase this cargo at all; secondly, I have no proof whatever that he has paid one single sixpence on account of the bills, but the contrary; and the only argument addressed to the Court is, that though he has not yet paid the money, yet he may be called upon by the holders of the bills in this country; the bills having been dishonoured, proceedings may be had, he may be sued, and he may pay. If that be true as stated, no doubt with great accuracy by Mr. Arthur, it is not a case where I can put liability in the nature of actual payment as a set off.

The learned counsel with great propriety argued another question, on which I do not know that it is necessary for me to pronounce a decided opinion; but it is this: that these bills having been given in order to pay for the cargo, whatever might be the case, however beneficial that might be to the owner of the ship, as owner of the cargo, or as entire owner, still that was not a proper demand against the ship itself. I do not think it is necessary for me to dispose of that question, because I am quite satisfied that in this case I cannot allow it to the master. The result is, that I must confirm the report of the registrar and merchants, and as I gave the master liberty to produce witnesses at the peril of costs, I am, in justice to the mortgagee, bound to condemn him in costs.

Proctor for the master, *Coote*; for the mortgagee, *Cattley*.

1853.
THE
"JULINDUR."
Judgment.

Bills, for which nothing has been actually paid by the master, though the liability remains, cannot be allowed as payment in the master's account.

THE "VIRTUE." (a)

THIS was originally a cause of possession, brought by the assignees of the estate of William Williams and Joseph Sawtell (trading under the firm of Phillips and Co.), bankrupts, the holders of 40-64th shares of this vessel, against John Hughes,

THE HIGH
COURT OF
ADMIRALTY.
July 9.

Transfer of
shares by sale
at auction, not
legally com-

(a) Reported by Dr. Spinks.

1853.

THE
"VINTUR."

pleted as required by the Registry Act, though the purchaser had paid a large sum of money. Vendors proceeding against the purchaser, in a cause of possession, not allowed their costs.

Statement.

the master of the said vessel and the owner of the remaining shares. The vessel was arrested on September 13, 1849, and Hughes being unable to procure bail, it was not released.

It appeared that in April, 1847, at a public auction of the assignees, the 40-64th shares were purchased by Hughes for the sum of 375*l.*, of which 37*l.* 10*s.* was paid at the time to the auctioneer as a deposit of 10 per cent., and two further sums of 240*l.* and 50*l.* were paid shortly afterwards to Mr. Phelps, who was acting as solicitor to the assignees. The balance, however, was not paid, and no bill of sale was delivered. Phelps did not pay over to the assignees the money received; and, on its being discovered that he was in difficulties, was removed from the solicitorship in October, 1848. On the assignees arresting the vessel, Hughes tendered the balance of the purchase-money, which was refused.

Hughes thereupon filed a bill in Chancery against the creditors' assignee and official assignee for specific performance, for an injunction to restrain the defendants from selling or parting with the ship, and for the damage which had been incurred by the proceedings taken by the assignees in the Admiralty Court. On the 4th of December, 1849, an injunction was granted upon the terms of the money being paid into Court. (a),

The case was heard in March, 1852, before Sir G. Turner V. C., who dismissed the bill, but without costs. This decision, against which Hughes appealed, was affirmed by the Lords Justices in the following June, on the ground that the Ship Registry Act, 8 & 9 Vict. c. 89., had not been complied with; but the Court gave the respondents no costs beyond the deposit. (b)

The injunction being dissolved, the assignees applied to this Court, on the 28th of July, 1852, to grant a decree of appraisal and sale, and Hughes, by counsel, moved the Court to direct 40-64ths only to be sold. The Court directed the ship to be sold. On the 8th of October, the proceeds of the sale were brought into the registry, and amounted only, through deterioration and expenses, to the sum of eight shillings and three pence, though at the commencement of the proceedings its value was about 600*l.*

The assignees then applied to the Court to condemn Hughes in costs, in objection to which he prayed to be heard on his petition. This petition, stating the facts of the case, and the answer of the assignees denying the relevancy of the averments in the act, now came on for argument.

(a) See *Hughes v. Morris*, 9 Hare, 636.

(b) See *Hughes v. Morris*, 2 De G. M. & Gor. 349.

Dr. *Jenner* appeared for *Hughes*; Dr. *Deane* for the assignees.

1853.
THE
"VIRTUE."

Judgment.

DR. LUSHINGTON. The circumstances of this case are not disputed with regard to any of the important facts. It appears to have been originally a cause of possession, and to have been instituted by the official assignees, as I understand it, of a person who was trading under the firm of *Phillips and Co.*, and who became bankrupt.

They alleged themselves to be the owners of 40-64ths of the schooner "*Virtue*," and proceeded in this Court in a cause of possession. Now, it is a fact not disputed on the present occasion, that *Mr. Hughes*, the party against whom the cause was in substance promoted, had been a purchaser at a public auction, sanctioned by the assignees themselves, of these 40-64ths shares, and that he paid on that occasion to the auctioneer, the sum of 37*l.* 10*s.*, and that he paid to the solicitor of the assignees at one time 240*l.*, and at another time 50*l.*, and offered to pay the balance, but no bill of sale was made out to him. It is an important fact in this case, and it is not denied, that *Mr. Hughes* did pay this money to this person of the name of *Phelps*, who was the authorised solicitor or agent of the assignees.

The property being arrested here, three defaults were granted, and on the 21st of November, 1849, a proctor appeared for *Mr. Hughes*, alleged him to be the sole owner of the ship, and undertook the payment of the contumacy fees, which of course must be paid; and the Court thereupon assigned the proctor for the assignees to bring in an act on petition, and, at his prayer, decreed a monition against *Mr. Hughes* to bring in the ship's register.

At this time, *Mr. Hughes* was advised to have resort to the Court of Chancery, and an injunction was issued by that Court, by which the proceedings in this were suspended until that injunction was finally dissolved, after the hearing before *Sir G. J. Turner*, V. C., and also the hearing before the Lords Justices.

It appears, from the report of that case, that the Lords Justices, as well as the Vice Chancellor, decided that *Mr. Hughes* had no legal right to the 40-64ths, because there was no bill of sale, and because the provisions of the Ship Registry Act (*a*) had not been complied with; but at the same time, though he had no legal right or equitable title, and neither the Lords Justices nor the Vice Chancellor thought they could enforce a specific performance of the agreement, yet it does not seem to have been

(a) 8 & 9 Vict. c. 89.

1853.

THE
"VIRTUE."
Judgment.

In a case of palpable injustice, the Court would hold its hand, unless compelled by a superior Court to proceed.

denied that he paid the money, and it is not denied at the present moment.

The case comes back, the ship is sold, and the proceeds are spent to pay for the detention, which is not in the slightest degree to be ascribed to this Court, but to the proceedings in Chancery.

It is not for me to blame Mr. Hughes for going to a Court of Equity, because I presume he went under the advice of a person quite competent to point out to him the best course to follow ; but I must observe that if, in the exercise of my jurisdiction, all these facts had come before me, I most undoubtedly should have considered myself at liberty to hold my hand before I decreed possession to the assignees ; because it would have appeared to me contrary to all justice and every principle of equity that I should have decreed possession of 40-64ths of this vessel, for which the assignees, through their agent, had actually received the purchase-money in a sale by auction which had been sanctioned by themselves. I think I should have held my hand, unless I had been compelled by the decision of a superior Court to carry into execution the powers with which the Court is invested. I do not think the assignees, under these circumstances, would easily have induced me to decree possession of that property for which they held the value in their own hands.

But be that as it may, the only question I have to determine is, whether I shall condemn Mr. Hughes in costs. Of course he must pay the contumacy fees. It has been urged that I ought to condemn him by reason of the creditors suffering. They, however, must always suffer by the acts of their assignees, who represent them. They have a certain power of control if the assignees do not do their duty, and they must always abide for good or evil by the legal acts of those assignees. Now, I think, under the circumstances of this case, that the Lords Justices and the Vice Chancellor having refused to interfere for Mr. Hughes solely on technical points, and not because the equity was not with him, not having given costs against him save the 20*l.* paid by way of deposit, and Lord Justice *Knight Bruce* having expressed himself in terms in which it is not denied he did express himself,— I do not think I am bound to adopt another course, and inflict the penalty of costs on Mr. Hughes. I shall, therefore, do no such thing.

Proctor for the assignees, *Tatham* ; for Mr. Hughes, *Jenner*.

THE MAGELLAN PIRATES.

THIS was a cause arising under 13 & 14 Vict. c. 26., in pursuance of which the Court was prayed to determine and pronounce that certain persons captured by Her Majesty's sloop "Virago," in the Straits of Magellan, were pirates, and to adjudge the number of them, in order to the usual application being made for the bounty.

The circumstances which gave rise to the capture are detailed in the case of the "Segredo," otherwise "Eliza Cornish" (a), and in the judgment. (b)

These cases have generally been decided in a summary manner on the hearing of the petition; but in the present case the petition was opposed by the Queen's Proctor, the Admiralty Proctor, and also a proctor for the owner of the "Eliza Cornish," who asserted an interest, inasmuch as, if the men who seized the "Eliza Cornish" were not pirates, but only revolted subjects of the Chilian Government, his party would then have a claim for damages against that Government; which, if the men were pirates, could not, as he was advised, be supported.

The *Queen's Advocate*, the *Admiralty Advocate*, Dr. Deane, Dr. Haggard, and Dr. Twiss, appeared against the petition; Dr. Addams and Dr. Bayford in support of it.

DR. LUSHINGTON. The Court has two questions to determine; first, whether the acts set forth in these proceedings were done by persons falling under the denomination of pirates according to the true construction of the two Acts of Parliament passed upon this subject. I say the two Acts, because, though I am fully aware that the first, viz., 6 Geo. 4. c. 49. is repealed, yet I think that in ascertaining the true meaning of the statute now in existence, viz., 13 & 14 Vict. c. 26., I am bound to look at both Acts.

Should this first question be decided in the affirmative, then it will be necessary to determine as to the number of persons which the Court is to pronounce as having been concerned in this piracy.

The last Act of Parliament which I have mentioned must certainly govern the decision of the Court; but my reason for thinking that I must not lay out of consideration the preceding statute is, that I think these two Acts must be taken together in any attempt which is made to ascertain the true meaning of

1853.

THE HIGH COURT OF ADMIRALTY.

July 26.

Three hundred and thirty-four subjects of the Chilian Government, who had risen in rebellion against it, and had also seized the vessels of other countries, held to be pirates within the meaning of 13 & 14 Vict. c. 26.

Statement.

Judgment.

July 26.

Two questions to be determined:—1st. Do the persons stated in these proceedings to have been captured, fall under the denomination of pirates? 2nd. What was their number?

The statute 13 & 14 Vict. c. 26. must be read in connection with 6 Geo. 4. c. 49.

(a) *Anté*, p. 36.(b) *Post*, p. 86.

1853.

THE
MAGELLAN
PIRATES.
Judgment.

the latter. The last Act, it is true, in many respects, has essentially departed from the preceding, but I think it is exceedingly doubtful, though the terms differ, whether it was intended by the Legislature to alter the definition or meaning of the word "pirates;" or, in other words, whether a different set of persons, on account of whom bounty was to be granted, was contemplated by the second Act. It is true, that the expressions differ, but it is possible that the same idea is intended to be conveyed in different words.

Now, the words of the first Act of Parliament are these: — "The actual taking, sinking, or destroying of boats, &c., manned by pirates or persons engaged in acts of piracy;" and the second Act has these words: "After the said 1st day of June, attack or be engaged with any persons alleged to be pirates, afloat or ashore." The words omitted, therefore, in this latter Act, are — "persons engaged in acts of piracy," and the words substituted are, "persons alleged to be pirates."

It is perfectly true, as a general principle, that effect ought to be given, if practicable, to every word in an Act of Parliament; but I think that that principle may be answered in two ways, — either by holding that the words have two distinct and separate meanings, or, that the second expression is merely explanatory of the first. I am very much inclined to think, looking at the original Act of Parliament, that the words "pirates or persons engaged in acts of piracy," were not intended to embrace two different sets of people. Of course I need not say how very difficult it is to ascertain what the real intention of the Legislature is, or what was to be expressed by words of this description. But I have the greatest difficulty in satisfying my own mind that there is any substantial or real difference between "pirates" and "persons engaged in acts of piracy."

Assuming, however, that the words have two distinct meanings, viz., that by the first Act, "pirates," in the strict sense of the term, are meant, and that the expression "persons committing piratical acts" has another meaning, though we are not able to say what; it does not appear to me necessarily to follow, that the omission of the words in the second statute entails the necessity of putting a more limited construction upon it, because the words are altogether changed, and simply are what I have stated, "persons alleged to be pirates."

It may be well, I think, to bear in mind what is the object of both statutes, because, respecting that matter there can be no doubt. The title to the first is, "An Act for the encouraging the Capture or Destruction of Piratical Ships and Vessels," and it must have been the wish and intention of the Legislature to

The object of both statutes was to put down piratical acts, by whomsoever com-
—^{mitted}—

put down piratical acts by whomsoever committed. Now, how am I to determine who are pirates, except by the acts that they have committed? I apprehend that, in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our Courts of Common Law ever thought it necessary to extend their inquiries further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. Whatever may have been the definition in some of the books, and I have been referred by Her Majesty's advocate to an American case (a), where, I believe, all the authorities bearing on this subject are collected, it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had intended to rob on the high seas, or to murder on the high seas indiscriminately.

Though the municipal law of different countries may and does differ, in many respects, as to its definition of piracy, yet I apprehend that all nations agree in this: that acts, such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations.

It is true, that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. But, however this may be, I do not think it necessary to follow up that disquisition on the present occasion. I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.

Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a

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THE
MAGELLAN
PIRATES.
Judgment.

In criminal law, all persons found guilty of piratical acts are held to be pirates.

All nations agree that robbery and murder on the high seas are piratical acts.

It does not follow that, because persons are insurgents or rebels against the government of their own country, they may not also commit piratical acts against others.

An independent state may be guilty of piratical acts.

(a) *The United States v. Smith*, 5 Wheaton, 153, *post*, p. 90.

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MAGELLAN
PIRATES.
Judgment.

Intention of
the Legislature
was that acts
of piracy
should consti-
tute men
pirates.

In construing
Acts of Par-
liament the
presumption is,
where nothing
to the contrary
appears in the
context, that
an expression
is used in con-
formity with a
similar expres-
sion known in
Common Law.

Piracy at Com-
mon Law.

state cannot be piratical; but I am not disposed to assent to such *dictum* as a universal proposition.

It appears to me, therefore, that in affixing a construction to this statute, I am entitled to hold that the intention of the Legislature was, that acts of piracy might constitute men pirates, notwithstanding they were committed by the subjects of a barbarous state, or by insurgents. It appears to me this is true as a general, though, perhaps, not as a universal proposition.

Having thus briefly stated my opinion as to the construction of the statute, I will now advert, with equal brevity, to what appears to have been our own law; and for this purpose: because in considering what is the true meaning of an Act of Parliament where any expression is used, I think the probability is, where nothing appears in the context to the contrary, the term in the Act of Parliament is used in conformity with a similar term known in Common Law, and not in a more general or extensive sense.

Now, I refer to Russell on Crimes, where we find the result of many older authorities. He commences in these words: "The offence of piracy, at Common Law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there" (a): and in a subsequent part I find the following: "If a robbery be committed in creeks, harbours, ports, &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy." (b) There is a case also stated here which I think applies: "Where a prisoner was indicted for stealing three chests of tea out of the 'Aurora,' of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing or otherwise, at the place where the vessel lay; it was held, from the circumstance that the tea was stolen on board the vessel which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas." (c)

Again, it was decided in another case, that where A, standing on the shore of a harbour, fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about 100 yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy. (d)

It appears to me, therefore, that, from the quotations which I have just made, I derive two advantages; one, in being

(a) Russell on Crimes, book ii. ch. 8. s. 1.

(b) Ibid. s. 2.

(c) Ibid.

(d) Ibid.

enabled with greater certainty to affix a true meaning to the statute itself; the other, a reference to what I must more particularly consider,—the place where the occurrence happened.

I will now advert to so much of the facts as will be sufficient to enable me to judge whether the present claim is well-founded.

It appears that, towards the latter end of 1851, there was an insurrection in some of the dominions belonging to the States of Chili. General Cruz was at the head of this insurrection, failed, and retired into the country. There was a Chilian convict settlement at a place called Punta Arenas, the garrison of which consisted of 160 soldiers, and 450 male convicts. An officer in that garrison raised an insurrection against the governor, murdered him, and, in conjunction with those who conspired with him, seized a British vessel, called “The Eliza Cornish,” and also an American vessel called the “Florida.” They murdered the master of the “Eliza Cornish,” and a Mr. Deane, a passenger and part owner, and they also murdered the owner of the “Florida,” who was on board. These facts coming to the knowledge of Admiral Thoresby, the commander-in-chief of that station, he despatched the “Virago,” a British steamer, under the command of Captain Houston Stewart, to the Straits of Magellan. On the 28th January, 1852, a vessel, which proved to be the “Eliza Cornish,” was descried working out of the Straits; chase was made; a shot fired across her bows brought her to; she was boarded and seized by orders of Captain Stewart.

At the time she was so seized she was in possession of a large number of the persons who had raised the insurrection at Punta Arenas. There were found on board her 128 men, 24 women, and 18 children; the guns were loaded and the men were armed. These were under the command of a man named Bruno Brionis, who held a commission from Cambiaso, the leader of the insurrection, and the instigator of the murders and robberies then committed; and these men were afterwards delivered up to the Chilian authorities at Valparaiso. Captain Stewart proceeded in search of Cambiaso and the other insurgents, giving that name to those who had left Punta Arenas. He secured fifty-six at a place called Wood’s Bay, and on the 15th February he discovered the “Florida” herself, in the possession of a large number of the same people. It was said that these insurgents had, whilst at sea, risen against Cambiaso and five others, and, with the aid of the American master and crew, brought the vessel to the port where Captain Stewart had found her.

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THE
MAGELLAN
PIRATES.
Judgment.

The facts of
the present
case.

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THE
MAGELLAN
PIRATES.
Judgment.

These trans-
actions un-
doubtedly
piratical, al-
though they
may have been
the acts of
insurgents.

On board the "Florida" was found treasure which had been plundered from the "Eliza Cornish." All the persons on board the "Florida," not American, were delivered up to the Chilian authorities.

As to the general character of these transactions, I really cannot bring myself to entertain a doubt. Even if I could be induced to adopt the distinction, that the acts in question were the acts of insurgents, I should still, even from that, adhere to the opinion that they were piratical acts; — piratical acts, too, in my judgment, in no degree whatsoever connected with the insurrection or rebellion, or with the intention of these parties to go to any other part of the world. They were acts, in one sense, of wanton cruelty, in the murder of foreign subjects, and in the indiscriminate plunder of their property. I am of opinion that the persons who did these acts were guilty of piracy, and were to be deemed pirates, unless some of the other objections which have been urged ought to prevail.

The objection
that these acts
were not com-
mitted on the
high seas, and
were therefore
not legally
piratical, can-
not be sus-
tained.

It has been said that these acts were not committed on the high seas, and, therefore, the murder and robbery not properly or legally piratical. This objection well deserves consideration; for it is true that murder and robbery, done upon land, and not by persons notoriously pirates, would not be piracy. Here, as I understand the facts, the "Eliza Cornish" and the "Florida" were seized in port, and the murders committed in port or committed on land, on the persons taken out of the vessels. Had the vessels been recaptured whilst lying in port, there might be raised an argument, though I do not say it would prevail, that these offences, legally speaking, would not be classed as acts of piracy. I say it might be so; though I am not disposed to hold that the doctrine that the port, forming a part of the dominions of the State to which it belongs, ought in all cases to divest robbery and murder done in such port of the character of piracy. I am much more strongly inclined to hold this from the facts quoted from Russell; and I am still more inclined to come to that conclusion for another reason, because the statute expressly contemplates acts done on shore, for these are the words: "Shall, after the said first day of June, attack or be engaged with any persons alleged to be pirates, afloat or ashore," manifestly intending to take cognisance of piratical offences, or offences of that class, when they were committed on shore. It would quite fail if it were not so; because we all know that pirates are not perpetually at sea, but under the necessity of going on shore at various places; and, of course, they must be followed and taken there, or not at all.

In this case, however, the ships were carried away and navi-

gated by the very same persons who originally seized them. Now, I consider the possession at sea to have been a piratical possession; to have been a continuation of the murder and robbery; and the carrying away the ships on the high seas, to have been piratical acts, quite independently of the original seizure.

1863.
THE
MACGILLAN
PIRATES.
Judgment.

The next question for consideration is, whether there was such an attack or engagement as satisfies the true meaning of the Act of Parliament, which requires me to certify. The words of the Act are "shall attack or be engaged with any persons alleged to be pirates, afloat or ashore." I am to determine whether the persons or any of them so attacked or engaged were pirates, and to adjudge what was the total number of pirates so engaged or attacked. These are the words of the Act of Parliament.

Next question is, was there such an attack or engagement as to satisfy the true meaning of the Act of Parliament.

There is, I apprehend, a clear difference in the meaning of these two words. I take an attack to be the use of, or the attempt to use, force or violence. I take it, it is not necessary, to constitute an attack, that there should be any resistance, or any actual combat or any blood spilt. Engagement is a different word, and seems necessarily to imply that there was something of a combat or fight.

Now, with respect to the capture of the "Eliza Cornish," it appears to me fairly to fall within the meaning of the Act of Parliament. She was in possession of pirates; her capture was effected by intimidation, by an overpowering force: she yielded of necessity, when a gun was fired across her bows. I cannot conceive that, in order to bring this case within the meaning of the statute, it was necessary that a gun should be fired into her. I think that bloodshed is not an indispensable ingredient to form an attack within the meaning of the statute, and that the Legislature never intended that, in order to entitle themselves to reward, the captors must take away human life.

Capture by means of intimidation, without bloodshed, is sufficient to satisfy the terms of the statute.

My opinion on this point is not shaken by the statement of the mate of the "Eliza Cornish." Mr. Smith represents that Brionis was in command of the "Eliza Cornish," and, upon descriing the steamer, desired him to hoist Russian colours, which he refused to do. He says that, after a struggle, he threw them away, and that he assured Brionis that if he and his comrades would go below, he would pass the steamer unobserved that they accordingly did go below, and that the steamer soon afterwards fired a gun, and that he (Smith) then brought the brigantine to, and she was taken possession of by the "Virago."

In my judgment, if all these facts were literally true, they offer no important consideration for the decision of this case. All this was utterly unknown to Captain Stewart; resistance

1853.

THE
MAGELLAN
PIRATES.

Judgment.

Such was the capture of the "Eliza Cornish" by the "Virago"

would have been offered by those in possession of the "Eliza Cornish," if it had been possible; they only availed themselves of the device of Mr. Smith, for the chance of an escape when resistance, which they were willing to offer, would have been in vain. No man, I think, can reasonably doubt that the capture of the "Eliza Cornish" was effected by force alone,—not, indeed, by actual violence, but by an intimidation which rendered it unnecessary; and this I conceive to be as much an attack as where a highwayman presents his pistol, and the traveller yields without attempting resistance.

In determining the numbers, the Legislature never intended to require precise evidence as to individuals.

I must next determine as to the capture of the fifty-six persons at Wood's Bay. I must here observe, that I believe it is utterly impossible to obtain, and I believe the Legislature never intended to require, precise and accurate evidence as to the capture or destruction of persons of this description, nor as to the character which belonged to each and all of them. It is clearly impracticable to ascertain or designate individually all those who were concerned in this atrocious transaction. It is, I think, fair to conclude that all who embarked on board the "Eliza Cornish" or the "Florida," save the American crew, were conspirators in the original murders and robberies which I have already mentioned.

The fifty-six persons captured at Wood's Bay are sufficiently identified to come within the meaning of the statute.

It appears that Cambiaso, the ringleader of this band of ruffians, had landed from the "Florida" fifty-six persons at Wood's Bay, and these were amongst those embarked at Punta Arenas, and were on board the American vessel at that place. By a judicious arrangement of the force at his command, Captain Stewart surrounded and made prisoners of the whole, and so, in execution of his orders to clear the Straits of all difficulties opposed to navigation, he did clear them of a band of persons who, by their past misconduct, had shown themselves ready to commit any crime, however atrocious. Looking at this transaction as I am compelled to do, in its narrowest point of view, my opinion is, that it fairly falls within the just construction of the words of the Act of Parliament.

So also were those found on board the "Florida."

Lastly, my attention must be directed to the recapture of the "Florida." In the port of San Carlos, in the island of Chili, Captain Stewart found her, with a considerable portion of the treasure originally shipped in the "Eliza Cornish" on board of her. Cambiaso had originally embarked on board this vessel at Punta Arenas, and had intended to prosecute his voyage to the eastward, and, as I think is proved from the evidence, to some port not in the dominions of Chili. But that I hold to be a matter of no importance, and shall not endeavour to ascertain how that may be. Here she was when the "Virago" found

her at San Carlos, in possession of a part of the persons who had originally embarked in her at Punta Arenas; but they had risen on Cambiaso, and he and some of his comrades were in confinement. She then was in the actual possession of those who, according to the judgment I must form, had been concerned in acts of piracy, and not only that, but who had continued the acts by carrying the vessel away over the sea for their own object and for their own advantage.

It does not appear to me to matter which of the pirates were in possession,—which, for the time, had the upper hand; whether Cambiaso and those that adhered to him, or whether those who rose against Cambiaso, and put him into confinement with others. I think they are all to be placed in the same category, and all to be deemed pirates.

It was suggested that there were two vessels of war present at the time belonging to the Chilian Government, but whether capable or not of effecting a recapture, they had neither done nor attempted anything when Captain Stewart arrived. He, on his arrival, immediately placed his vessel alongside the “Florida,” and boarded her with a party of officers and men; and took forcible possession of her again.

I say that, looking at all these circumstances, I think this recapture could only have been effected from terror of the superior force which was brought to bear against the vessel; and again, I think it does, with the previous acts, fairly fall within that construction which the Act of Parliament admits of.

It only remains to determine the number for which it is the duty of the Court to pronounce. There are three claims:—for 128 taken in the “Eliza Cornish,” for the 56 taken at Wood’s Bay, and for 200 taken on board the “Florida.” For the first and second I pronounce; but with regard to the last, more doubt may be entertained, and, in order to keep within due bounds, I shall fix that at 150 instead of 200.

I cannot conclude my judgment without expressing my opinion that it was for services like these that the Legislature intended to provide a reward; services of great importance to the safe navigation of the seas in that part of the world, and effected by the capture of a band of persons whose acts of murder and plunder, both on land and at sea, rendered their capture and punishment indispensable to the safety of ships of all nations occupied in those waters.

I trust I have not put too latitudinarian a construction on this Act of Parliament, from my high consideration of the services so rendered, and of the decision and promptitude whereby those measures were so successfully taken; and I repeat my

1853.

THE
MAGELLAN
PIRATES.
Judgment.

Court pro-
nounces for
334 persons.

1853.
 THE
 MAGELLAN
 PIRATES.
Judgment.

opinion, that the persons so taken are justly to be deemed pirates, and were, when captured, within the meaning of the Act. (a)

Proctors for the respective parties before the Court: the *Queen's Proctor*, the *Admiralty Proctor*, *F. Clarkson*, and *Burchett*.

(a) This decision also terminates, from pirates is fixed by the Act of Parliament at one-eighth of the value. in fact, the suit for salvage, arising out of the same transaction; for the salvage reward for such recapture

UNITED STATES v. SMITH. (b)

The jury found a special verdict as follows:—"We, of the jury, find that the prisoner, Thomas Smith, in the month of March, 1819, and others, were part of the crew of a private armed vessel, called the 'Creollo' (commissioned by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and, in the said port of Margaritta, seized, by violence, a vessel called the 'Irresistible,' a private armed vessel lying in that port, commissioned by the Government of Artigas, who was also at war with Spain; that the said prisoner and others having so possessed themselves of the said vessel, the 'Irresistible,' appointed their officers, proceeded to sea, on a cruise, without any documents or commission whatever, and while on that cruise, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the Act of Congress (c) of the United States, entitled 'An Act to protect the Commerce of the United States and punish the Crime of Piracy,' then we find the said prisoner guilty; if the plunder and robbery above stated be not piracy under the said Act of Congress, then we find him not guilty."

The Circuit Court of Virginia divided on the question, whether this was piracy as defined by the Law of Nations, and was to be punishable under the Act of Congress of the 3rd of March, 1819, and thereupon the question was certified to the Supreme Court of the United States for its decision. The Court certified that it was piracy, and in the course of the judgment Mr. Justice *Story* said, "It is next to be considered whether the crime of piracy is defined by the Law of Nations with reasonable certainty. What the Law of Nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognising and enforcing that law. There is scarcely a writer on the Law of Nations who does not

(b) 5 Wheat. 153.

(c) Which provides, "that if any person or persons whatsoever, shall,

on the high seas, commit the crime of piracy, as defined by the Law of Nations, &c."

allude to piracy as a crime of a settled and determinate nature ; and whatever may be the diversity of definitions on other respects, all writers concur in holding, that robbery or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt. The Common Law, too, recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the Law of Nations (which is part of the Common Law), as an offence against the universal law of society ;— a pirate being deemed an enemy of the human race. Indeed, until the statute of 28 Hen. 8. c. 15., piracy was punishable in England only in the Admiralty as a civil law offence, and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence. (a) Sir Charles Hedges, in his charge at the Admiralty Sessions, in the case of *Rex v. Dawson* (b), declared, in emphatic terms, that “ piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty.” Sir Leoline Jenkins, too, on a like occasion, declared that “ a robbery, when committed upon the sea, is what we call piracy,” and he cited the civil law writers in proof. And it is manifest from the language of Sir William Blackstone in his comments on piracy, that he considered the Common Law definition as distinguishable in no respect from that of the Law of Nations. So that whether we advert to the writers on the Common Law, or the Maritime Law, or the Law of Nations, we shall find that they universally treat of piracy as an offence against the Law of Nations, and that its true definition by that law is, robbery upon the sea.”

(a) Hawk. P. C. c. 37. s. 2.

(b) State Trials.

1853.
UNITED
STATES
v.
SMITH.

THE “CARRON.”

THIS was a cause of damage, promoted by the owners of the “Pursuit,” a collier brig of 180 tons burthen, against the steamship “Carron.”

The collision occurred off Flamborough Head, about ten or twelve miles from the land, between seven and eight o'clock on the morning of the 2nd of May, 1853. The brig was on a voyage from Hartlepool to London, laden with coal, was close hauled on the larboard tack, steering about south and by east, and under all sail. She alleged, *that* the mate was at the wheel of the brig, and a seaman forward on the larboard side of the fore-castle, keeping a strict look-out, inasmuch as the weather was foggy, though not so much so as to prevent vessels from being seen from each other at the distance of about three cables' length; *that* at this time, and in this state of things, the “Carron” was seen by the look-out at the distance of about three cables' lengths on the brig's starboard bow, steering about north, and rapidly approaching the brig; *that* the look-out, as also the mate, who kept the brig's helm steady, never altering

THE HIGH
COURT OF
ADMIRALTY.

Nov. 17.

Collision. A collier brig out at sea in foggy weather, desorying a steamer at a distance, as she stated, of three or four cables' length, held to blame for not having given notice by blowing a fog-horn.

Statement.

1853.

THE
"CARRON."
Statement.

her course, immediately and loudly hailed the steamer, but to no purpose, inasmuch as she also kept her course, and without (so far as appeared) either altering her helm or slackening her speed, presently came into collision with the brig, striking her a sliding blow on the starboard quarter abaft the midships with her (the steamer's) starboard bow; *that* the collision was imputable to those on board the "Carron," inasmuch as if they had had a good look-out they might and must have seen the brig in ample time to have enabled them, taking the proper steps for that purpose, to have avoided coming in contact with the brig, &c.

The "Carron," in answer, alleged, *that* on the said morning the fog was so thick that an object could not be seen beyond the ship's length; *that* she was proceeding with the greatest caution at no greater speed than was sufficient to navigate her, and kept her bell and steam whistle alternately going; *that* several men were on the look out, and suddenly descried the brig within a ship's length on her starboard bow, no notice of her approach or proximity to the steamship having been given by any bell, whistle, hailing, or other signal from on board the said brig; *that* the helm of the steamship was immediately put to starboard, and her engines stopped and reversed, but from the nearness of the two vessels to each other a collision could not be avoided between them; *that* the same was occasioned by the state of the weather, and the want of a proper precaution on the part of the brig in not keeping a bell, whistle, or some other signal going, as a notice of their approach, &c.

Dr. *Addams* and Dr. *Spinks* appeared for the owners of the "Pursuit;" Dr. *Robinson* and Dr. *Jenner* for those of the "Carron."

Summing-up.

Doubtful circumstances must be judged by the facts that are admitted or indisputably proved.

DR. LUSHINGTON, addressing the Elder Brethren:—Gentlemen, it frequently happens in these, and I might say, in other cases, that the safest mode of coming to a conclusion is, where you find certain facts and circumstances admitted, or indisputably proved, and where others are doubtful, to make those doubtful facts consistent, if possible, with those that are certain and proved indisputably. I must rather explain myself on that subject. If you have the fact, for instance, of the state of the wind, of the description of the vessels, and of the course they are steering, time and place, all indisputably proved, and if it be doubtful on the evidence produced, which very frequently happens, as to other parts of the case, you must endeavour to frame your decision so as to make the doubtful facts conform with those which are indisputably proved.

Now, upon the present occasion, there may be four different results: it may be, firstly, that the "Carron" was alone to blame; secondly, that the "Pursuit" was alone to blame, for want of a sufficient look-out or a fog-horn; thirdly, that both were to blame; and, lastly, that it was a case of inevitable accident, in which neither was to blame; and we are to determine upon the facts and circumstances which I am now about to bring to your attention, which of these four conclusions is the just and right one.

But before I proceed to do so, I will take the liberty of explaining the meaning, as it affects the decision of the case, of the *onus probandi*, the burthen of proof, of which you have heard something in the course of the argument. The party who charges another with an act is bound in the first instance to make out something like a case, the burthen of proof lies upon the plaintiff so far; but it does not at all follow that it lies upon him throughout the whole case; for frequently, by proving certain circumstances, the burthen of proof is thrown back upon the defendant, and he is bound to make out his case. This I will presently illustrate to you.

I will now approach the facts of the case, of which some are admitted; and, following the method which I have already mentioned, we will, if you please, take the facts so admitted, and then we will consider what are the litigated facts, and what degree of credence we should give to the one side or the other.

According to the statement of the "Pursuit" she was a vessel of the burthen of 180 tons, bound from Hartlepool from London, laden with coals. The time when the collision took place was about half-past seven, a. m., on the 2nd of May; the place was off Flamborough Head; the wind was S. E., and she was close-hauled on the larboard tack. She represents her course to have been S. by E., which is not strictly correct, and she was under all sail. Now, I apprehend that, being so close-hauled on the larboard tack, and it being a foggy morning, she could not be going at any very great rate at that time. She states that she saw the "Carron" steamer at the distance of three or four cables' length, hailed her, and kept her own course, and that the "Carron," without taking any notice, ran into her, and struck her on the starboard quarter.

Now, the result of that case, without considering the other, is, that it was the duty of the steamer, provided circumstances would allow her, to give way, and not to come into collision with a sailing vessel close-hauled, as this vessel was at that time. That is the rule of navigation, as we all admit. She has fulfilled the burthen of proof laid upon her; she has thrown

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THE
"CARRON."
Summing-up.

The *onus probandi* may shift from one party to the other in the cause.

1853.
 THE
 "CARRON."
Summing-up.

the burthen of proof back again; and it now becomes the duty of the "Carron" to state why she ought to be excused from the blame of this collision.

Now, the defence of the "Carron" is two-fold. First, she says, you, the "Pursuit," were to blame, for not having intimated your approach by sounding a fog-horn, or by some other means; but it will be for you, Gentlemen, to consider whether any culpability arises from that circumstance, because it is quite clear that no signal was given, that no fog-horn was blown. The next defence of the "Carron" is this, we did all that could possibly be done; we took every possible measure that we could adopt by way of precaution; but, unfortunately, from the state of the weather, and the absence of any signal from the "Pursuit," notwithstanding we did all that any one could require from persons so circumstanced, the collision took place.

Now, with respect to this point, I will bring under your consideration the representation given on behalf of the "Carron" herself, viz., the affidavit which has been made by the master and several others, and then you must form your judgment on what ought to be the result. Now, they represent the morning as being exceedingly foggy, that objects could not be seen at a greater distance than the ship's length. They say, too, that the steamship proceeded with the greatest caution, and not at a greater speed than was sufficient to navigate her, the bell and the steam whistle being kept alternately going. These facts are all distinctly sworn to in this affidavit, and there is nothing to contradict the statement so made; therefore, if the statement is credible, which it is if it is not contradicted by other facts, of which we have adequate and complete proof, it must be taken to be true. Passing by circumstances of no importance I go to this part of the affidavit, which is to the following effect: — "A vessel, which afterwards proved to be the 'Pursuit,' was suddenly seen by these deponents coming in a southerly direction, with all sail set;" — this is admitted to be true, — "and within a ship's length of the said steamship, on her starboard bow." Assuming this to be true, you will have to consider whether, if there was a proper look-out, they ought or ought not, according to your opinion, to have seen her at an earlier period. And you will also bear in mind the fact that she was seen on the steamship's starboard bow. Then they say, no notice was given of her approach; and "the master of the steam-vessel immediately gave orders to have her helm put to starboard, and her engines stopped and reversed, which orders were instantly obeyed; but, from the nearness of the two vessels to each other at the time, a collision could not be avoided."

If you are of opinion that all this statement is correct, and that it is reconcileable with other statements, of course you will give it credit; but you will bear in mind that it is stated in this very affidavit, first, that she was seen on the starboard bow; and, secondly, that the helm of the steamship was put to starboard, and that, notwithstanding that, these two vessels came into collision; which is an admitted fact, the steamer striking the "Pursuit" on the starboard bow.

1853.
THE
"CARRON."
Summing-up.

Now these are all the facts and circumstances of the case. I can render you no further assistance in the formation of your opinion upon them. You, as nautical men, will have the kindness to tell me, whether the "Carron" was to blame at all; whether she was solely to blame, or to blame in conjunction with the "Pursuit"; or whether you think, all proper measures having been taken on board the "Carron," this collision was the result of inevitable accident, arising from the foggy state of the weather, which rendered all precautions whatever, when taken, inefficient to avoid the collision.

The Court and the Elder Brethren having retired for consultation, on their return

DR. LUSHINGTON said, the gentlemen with whose assistance I am favoured are of opinion that the "Pursuit" was to blame in this respect, that having seen the "Carron" at the distance at which they represent they did see her, she ought to have given notice by blowing a fog-horn (*a*), which she omitted to do. They are also of opinion, that the representations made on behalf of the "Carron" cannot be consonant with the fact, for if she did descry the vessel in the manner therein stated, and immediately starboarded her helm, it was utterly impossible she could have struck the "Pursuit" on the starboard quarter. Under these circumstances they are of opinion that the "Carron" was also to blame. I must pronounce, therefore, that both vessels are to blame.

Judgment.

Proctors, for the "Pursuit," *Burchett*; for the "Carron," *E. Toller*.

(*a*) The following passage appeared in the protest of the master and seamen of the "Pursuit":—"On the steamer, in the course of a few

minutes (after the collision), a bell was rung, which was answered by a fog-horn from the 'Pursuit,' and the steamer then returned," &c.

1853.

THE HIGH
COURT OF
ADMIRALTY.

Nov. 21.

Neither of two sailing vessels, which came into collision, having observed the Admiralty regulations respecting lights, and neither having pleaded that the collision was occasioned by such non-observance on the part of the other, the Court, nevertheless, *held*, that under the circumstances of the case, both vessels were barred of recovery by 14 & 15 Vict. c. 79. s. 28.

Summing-up.

THE "ALIWAL."

THIS was an action for damage promoted by the "Ann Moore," a brig of 238 tons burthen, against the "Aliwal," a brig of 203 tons. The latter was proceeding in ballast from Gravesend to the Tyne; the former with a cargo of coals from Shields to London, when they came into collision about ten miles from Flamborough Head, on the night of the 9th of January last. As the case on both sides is stated by the Judge in his "summing up," and the judgment, moreover, turned upon a point which was neither put in plea nor touched upon in argument, it is unnecessary to give the pleadings.

A cross action was entered on behalf of the "Aliwal."

Dr. *Addams* and Dr. *Deane* appeared for the "Ann Moore."

Sir *J. D. Harding* Q. A. and Dr. *Bayford* for the "Aliwal."

DR. LUSHINGTON, addressing the Elder Brethren:—
Gentlemen, I must trouble you with a brief statement of the leading facts in this case in order to lead you to the questions upon which I wish to have your opinion.

Now the case of the "Ann Moore" may be stated very concisely. She was bound from Shields to London, laden with coals; the time when the collision took place was about half-past eleven o'clock, p.m., on the 9th January last, and the place was nine or ten miles distant from Flamborough Head. According to the statement of the "Ann Moore," the wind blew from the W.S.W., which I apprehend was an adverse wind. According to her representation the night was dark, but clear, and she was on the starboard tack, close hauled. She represents that she saw the "Aliwal" three points on her starboard bow, and running N. by E., distant about one mile, and that when within 100 yards of each other, the helm of the "Aliwal" was put to port. They hailed the "Aliwal" to keep her course, but soon afterwards she put her helm to starboard, the result of which was that she ran into the "Ann Moore," striking her with her fore rigging on her starboard bow. That is her statement.

It was represented, and strongly argued by counsel, that this statement cannot be consistent with truth, because no collision could have taken place in the manner stated. You will give such weight to that argument as you think the circumstances will justify; but be that as it may, the fault of the "Aliwal" is said to be, that without necessity she attempted to cross the

bows of the "Ann Moore" by porting her helm, and that then, instead of keeping her helm apart, she starboarded. That is the case of the "Ann Moore," and it seems a simple one, provided it be consistent with ordinary probability.

The case of the "Aliwal" is, that she is a vessel of 203 tons, was in ballast, bound from Gravesend to the Tyne; was on the larboard tack, going from four to five knots an hour, with the wind blowing from S.W. by W. There is a difference in the statements as to the wind, the other vessel stating that it was W.S.W.; but I do not think it is of any consequence. She states her own course to have been N.W., and that she could see vessels only at a distance of a quarter of a mile; so that, according to her representation, the night was dark, and there was much more difficulty in discerning objects at a distance than is represented by the "Ann Moore." She farther states that the "Ann Moore" was seen one point on the "Aliwal's" larboard bow; that the "Ann Moore" was steering S.S.E.; that the "Aliwal's" helm was put hard apart, and then the "Anne Moore" starboarded, whereby a collision was rendered almost inevitable; that the "Aliwal's" helm was starboarded, and then the "Ann Moore" ported. She states that immediately after the "Ann Moore" had ported, she struck the "Aliwal" stem on, in the way of her main rigging, on the starboard side. She then alleges that the blame was attributable to the "Ann Moore" for not continuing her course, but in the first instance starboarding, and then porting her helm.

These statements appear irreconcilable in themselves; you will therefore favour me with your judgment as to which is consistent with truth,—on which side the decision ought to be.

It was argued by counsel, and, I must say, very concisely, and at the same time with great ability, that the "Ann Moore" ought to have luffed at the time: that will be a question for you to determine. Comment was also made on the fact of there being no protest in this case. I put very little weight on that argument, because I know very many vessels insured in mutual insurance clubs do not make a protest in cases of collision. It is constantly so represented. It is a common fact. But upon another ground I mind very little about protests in cases of collision. In salvage cases they are of importance, because the parties are obliged to make a representation of the facts, in order to claim from the insurance companies; they therefore proceed at once to state them, and they cannot afterwards deny what has taken place. But in these collision cases each party makes the best statement he can.

1853.
THE
"ALI WAL"
Summing-up.

Protest is of great importance in salvage, but not in collision, cases.

It is also objected that there is no affidavit from the man at

1853.

THE

"ALI WAL."

Summing-up.

the helm. Certainly, if his evidence had been important on the part of the "Ann Moore," they ought to have brought in an affidavit that he could not be produced; but there is the evidence of the master and other men.

With respect to the statement made before the receiver of droits, so far as there is a statement by the master himself, it is deserving of attention; so far as it is hearsay, it must be rejected; because hearsay evidence cannot be received in a court of justice.

The Court is bound to take notice of the statute 14 & 15 Vict. c. 79., and of the Admiralty rules, made by virtue thereof, though not put in plea, nor touched upon in argument.

I have now made all the observations which I think necessary, because you are so much more capable of comprehending the whole case than I am, except one. It was very well for counsel to pass it over, but I must not omit to refer to an Act of Parliament which involves one or both parties, or may so do. You know, gentlemen, there is a regulation under an Act of Parliament, which directs that "all sailing vessels, when under sail, or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision." (a) Now it is quite clear that neither of these vessels obeyed the Act of Parliament; there is no doubt about that; they neglected to obey that which was imperative upon them. But the Act of Parliament qualifies the rules and regulations laid down by the Lords Commissioners of the Admiralty, for it states, "If in any case of a collision between two or more vessels it appear that such collision was occasioned by the non-observance either of the foregoing rules with respect to the passing of steamers, or of the rules to be made as aforesaid by the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral with respect to the exhibition of lights, the owner of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatsoever for any damage sustained." (b)

Now if you should be of opinion, on the present occasion, that this collision was occasioned by the non-exhibition of lights by these two vessels, the result will be, that neither can recover in the present action. Whether you think, under the circumstances, the collision was occasioned by not hoisting a light, is a matter for your consideration upon the whole of the evidence. Upon that matter you must come to a conclusion.

(a) Admiralty notice respecting lights, dated May 1st, 1852, given by the commissioners by virtue of

the authority vested in them by 14 & 15 Vict. c. 79. s. 26.

(b) 14 & 15 Vict. c. 7. s. 28.

The learned Judge and the Elder Brethren having retired for consultation, on their return

1853.
THE
"ALIWAL"
Judgment.

DR. LUSHINGTON said: — The gentlemen, with whose assistance I am favoured, have considered the facts and arguments adduced in this case, and we have come to three conclusions: first, we are of opinion that the "Aliwal" is clearly to blame in this case; secondly, we are of opinion that evidence has not been produced to satisfy our minds that the helm of the "Anne Moore" was not starboarded; and thirdly, we think, under all the circumstances, the Act of Parliament has not been observed; that lights ought to have been hoisted. Therefore, under the 28th sect., neither party can recover, and each party must pay their own costs. (a)

Proctor for the "Anne Moore," *Crosse*; for the "Aliwal," *Bathurst*.

(a) An appeal has been entered, in this case, on behalf of the owners of the "Ann Moore."

THE "TWO SISTERS."

THIS was originally a cause of damage promoted by the owners of the fishing-boat "Good Samaritan," against the schooner "Two Sisters."

The collision took place on the 26th of September, 1851; a few days after some negotiation took place, and the agents of the owners of the "Good Samaritan" handed to the agent of the owner of the "Two Sisters" a statement of their claim, amounting to 126*l.* 7*s.* 3*d.*

Payment being refused, proceedings went on in the Admiralty Court, where, on the 19th November, 1852, the damage was pronounced for, and the accounts referred to the Registrar and Merchants.

The owners of the "Good Samaritan," in making up their accounts, calculated their loss at 183*l.* 14*s.* 7*d.*, but the proctor for the "Two Sisters" made a tender in acts of court of 126*l.* 7*s.* 3*d.*, the amount of the claim originally made by the agent for the "Good Samaritan," together with interest at the rate of 4*l.* per cent. from the date of the delivery of such claim.

This tender was refused, and the accounts, were submitted to the Registrar and Merchants, who, by their report dated August 5, 1853, pronounced for the sufficiency of such tender.

THE HIGH
COURT OF
ADMIRALTY.

Nov. 25.
Objection to
report of Re-
gistrar and
Merchants.

A claim by the owners of a damaged vessel for loss sustained, estimated moderately to avoid litigation, having been rejected, and the matter afterwards referred to the Registrar and Merchants, the owners are not bound by their original estimate, nor barred of their right to prove an actual loss greater than that estimate.

Statement.

1853.
 THE "TWO
 SISTERS,"
Pleadings.

To this report the proctor for the owners of the "Good Samaritan" objected, and brought in an act on petition, alleging, among other things, *that*, on the 14th of the said month of October, the agent for the owner of the schooner called upon the agent of the owners of the said lugger for an account of the damage caused by the said collision, expressing a wish to settle the matter if it could be arranged upon fair terms; *that* the agent for the lugger thereupon, from verbal directions of one of the owners of the lugger, and without reference to any of his books or accounts, wrote out the claim annexed to the interrogatories to the witnesses examined on the libel given in in this cause, amounting to 126*l.* 7*s.* 3*d.*, and which claim was then handed to the agent for the owner of the schooner; *that* shortly after the decree of this Court pronouncing for the damage, the owners of the lugger caused her to be further repaired, at an additional cost of 6*l.* 11*s.* 1*d.*, such further repairs having been rendered necessary by the collision with the schooner, and not by any other cause whatever; *that* after the said decree, the agent for the owners of the lugger ascertained, upon reference to the books and accounts of his clients, that too small a sum had been charged for the value of the nets and ropes lost from the lugger, or sunk at the time of the collision, and of the fish on board the lugger at that time, and also of the loss incurred by the detention of the lugger at Hull; and accordingly prepared a fresh claim, amounting to 183*l.* 14*s.* 7*d.*, which was delivered to the proctor for the owner of the schooner, who thereupon tendered in acts of court the sum of 126*l.* 7*s.* 3*d.*, the amount of the claim originally handed to his client, and 8*l.* 2*s.* 10*d.* for interest thereon, which was refused; *that* it appears by the second schedule annexed to the report of the Registrar and Merchants, that they have adopted the claim so originally delivered to the agent of the owner of the schooner in every respect, and notwithstanding that evidence was tendered to them on behalf of the owners of the lugger that their actual loss considerably exceeded the said sum of 126*l.* 7*s.* 3*d.*; *that*, &c.

The answer denied *that* the additional repairs done to the lugger after the decree of the Court were rendered necessary by the collision; *that* after the said decree, the agent for the owners of the lugger ascertained, or *that* the fact was, that too small a sum had been charged, &c., and alleged *that* the original claim made by the owners of the lugger, amounting to 126*l.* 7*s.* 3*d.*, was made by them deliberately, and after due consideration, the said collision having occurred on the 26th

September, 1851, and the claim having been delivered on the 14th October following; *that, &c.*

Affidavits were brought in, and Mr. Clarke, the agent for the owners of the lugger, swore: "*that* when he handed the claim of 126*l.* 7*s.* 3*d.* to the agent of the owner of the schooner, he told him that such amount would be accepted, provided the same was paid at once; *that* he verily believes that such sum was considerably below the loss which the owners of the lugger sustained by reason of the collision, and that the claim was sent in at the time with the view of getting the matter settled without going to law."

Dr. Jenner appeared in opposition to the report of the Registrar and Merchants.

Dr. Twiss in support of it.

DR. LUSHINGTON. I disclaim any attempt to express or to form an opinion of the real amount of damage occasioned by the collision in this case. I have not adequate materials for a decision upon that point, though possibly I may have materials to enable me to say that the Registrar and Merchants were right in the conclusion they have drawn from the evidence before them.

This case has been likened to a tender; but I must say that, in my opinion, if there is any resemblance at all, it is so remote that no argument can fairly be drawn from it. It appears that after the collision, which was the subject of the suit in this Court, had taken place, some negotiations were entered into by the agents of the parties with a view to a settlement, without the necessity of coming here at all, and that the agent for the "Good Samaritan" made a rough estimate of the damage she had received, and offered to settle the whole matter at once on the immediate payment of 126*l.* 7*s.* 3*d.* The negotiations failed, the suit commenced in this Court, the damage was pronounced for, and the accounts were referred to the Registrar and Merchants, whereupon the proctor for the "Two Sisters" tendered in acts of court the sum of 126*l.* 7*s.* 3*d.*, with interest, which was rejected. In the report, to which objection is now taken, the Registrar and Merchants have pronounced for the sufficiency of this tender.

Now whether they have taken the estimate originally made on behalf of the damaged vessel as conclusive and binding on the party, I have no sufficient means of forming an opinion; but I will state that, if they have done so, I have no hesitation in saying they have adopted an erroneous principle. The adoption of such a principle would be unjust to the parties, and also

1853.
THE "TWO
SISTERS."
Pleadings.

Judgment.

1853.
 THE "TWO
 SISTERS."
Judgment.

injurious in its tendency to prevent the settlement of these cases without the necessity of going to law. For how does the case stand? One party makes a rough estimate, and, as is stated, a very low estimate, of the various items of damage he has received, and then makes an offer to the other party—"If you will pay me this sum down at once, I shall be content;" the other party rejects this offer, and legal proceedings are the consequence. Now, can it be said that such an offer, made for the express purpose, as distinctly appears from the affidavit of the agent, of prompt and immediate payment, can bind the party at all after its rejection, and bar him of all proof that such estimate was far below the amount of damage actually sustained? I am of opinion that it cannot; and that though the Registrar and Merchants were justified in using it as evidence, yet, if they have used it as conclusive, instead of auxiliary, they have undoubtedly lost their way.

It does not follow, however, that because the Court holds that the party is not bound by the estimate, therefore the damage actually sustained was greater than the amount of that estimate. That is still a matter for evidence; and evidence which is fully entitled to due consideration has been adduced upon this point.

The learned Judge, after referring to some of the items in the account, continued:—I regret very much, the sums in dispute being so small, to be obliged to put the parties to any further expense, but I have no hesitation in saying, that if the Registrar and Merchants have adopted the original estimate as conclusive evidence of the damage, they have committed an error, and I must refer the report back for their further consideration.

Proctors for the "Good Samaritan," *Jenner*; for the "Two Sisters," *Deacon*.

CONSISTORY
 COURT OF
 LONDON.

July 27.

Until the marriage is either proved or confessed, in a suit for divorce, the Court cannot enforce, but only recommend, a payment to the wife in the nature of alimony *pendente lite*.

MITCHELL *against* MITCHELL.

THIS was a suit for divorce *à mensâ et thoro* by reason of adultery, promoted by the husband against the wife. The libel on behalf of the husband had been brought in, and stood for admission on the extra court day in August (the 5th). An allegation of faculties had also been given in by the wife. An affidavit by the wife was now brought in to the effect: "*that* since the month of October, 1852, she had not received any sum of money whatever from her husband for her support and maintenance; *that* in consequence thereof she had been in a

state of the greatest distress; and *that*, unless a sum of money was directed by the Court to be paid forthwith to her on account of alimony, she would have no alternative for herself and child but to seek assistance from the parish, or go into the workhouse."

Dr. *Deane* now moved the Court to be pleased to direct some sum of money to be paid to the wife, as on account of alimony, during the long vacation. He admitted, that as the marriage was not yet proved or confessed, he must ask it as a matter of favour, and not of right, and cited *Smyth v. Smyth*. (a)

The Court said that certainly, in the present stage of the proceedings, it was not in its power to enforce any payment to the wife, but strongly recommended that the husband should pay twenty-five shillings a-week to the wife during the long vacation.

Dr. *Haggard*, on the part of the husband, stated that he was willing to allow a guinea a-week, but the Court considered it too little, advised compliance with its recommendation, and strongly intimated that, in the event of non-compliance, the husband would have reason to repent it when the formal allotment of alimony, *pendente lite*, came before the Court after the long vacation.

The case came now before the Court for the formal allotment of alimony upon the answer of the husband to the allegation of faculties.

Nov. 16.
2nd Sess. Mich.
Term.

Dr. *Deane* and Dr. *Twiss* appeared for the wife.

Dr. *Haggard* and Dr. *Robinson* for the husband.

THE COURT decreed alimony at the rate of 80*l.* per annum from the return of the citation, deducting such sums as may have been paid to Mrs. Mitchell during the intermediate time.

Proctor for the husband, *Toller*; for the wife, *Jennings*.

(a) 2 Add. 254.

IN THE GOODS OF THOMAS DEWELL, DECEASED.

PREROGATIVE
COURT OF
CANTERBURY.

THE deceased died in August last, leaving a will, dated February 2, 1847, and a codicil, dated November 13, 1850. Both the will and codicil were in his own handwriting, and

Nov. 5.
Interlineations
were made in
a will by the
testator after
execution. He

sent for the witnesses, pointed out the alterations, declared he republished his will, and then acknowledged his original signature, but did not re-sign. The witnesses placed their initials opposite to the alterations, and also signed a memorandum at the foot of the will. — *Held*, a sufficient execution of the interlineations.

1853.
 IN THE GOODS
 OF THOMAS
 DEWELL,
 DECEASED.
Statement.

duly executed. But subsequent to the execution of the will, two interlineations were made therein, opposite to which, in the margin, appeared the initials of the subscribing witnesses, but not the initials nor signature of the testator. At the end, however, of the will, and below the names of the subscribing witnesses, was the following memorandum in the testator's handwriting: "Republished and declared by the testator, with the words, 'for her own use' interlined in the last line of the first page, and the words, 'in the names of the same trustees,' interlined in the eleventh line of the second page, in the presence of us who, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses, this first day of December, 1848." The names of the two subscribing witnesses to the will, but not the name of the testator, appeared immediately below this memorandum.

One of the witnesses was dead; the other made an affidavit to the effect, *that* on or about the date of this memorandum, the testator sent for them, produced his will to them, told them that he had made certain alterations, which he pointed out, and that it was necessary for him to republish it; *that* he then acknowledged his original signature, and they both subscribed their names to the memorandum, having previously placed their initials against the alterations, but the testator did not subscribe his name.

Dr. *Waddilove* moved for probate with the alterations, and submitted, that the signature of the testator being already upon the will as altered, his acknowledgment of it in the presence of the two witnesses, who subscribed their names, was a sufficient compliance with the 21st sect. of the Wills Act, without a re-signing on the part of the testator.

Judgment.

SIR JOHN DODSON. I am inclined to take the same view of it. What is stated in the affidavit respecting the transaction clearly proves the acknowledgment of the signature, and the witnesses having put their initials to the alterations, as well as their names to the memorandum, I think the party is entitled to probate of the will as it now stands with the alterations. The proper course, perhaps, would have been for the testator to have re-signed his name, as the witnesses did; but I don't know that the omission is fatal to the validity of these interlineations. I grant the motion.

Proctor, *H. P. Clarke.*

IN THE GOODS OF THOMAS SMITH,
DECEASED.

1853.

PREROGATIVE
COURT OF
CANTERBURY.

Nov. 5.

A testator duly executed his will, appointing his wife, H. S., universal legatee for life. She dies. He then marries her sister, and afterwards dies. The Court refused to grant probate of the said will as unrevoked by the incestuous marriage upon an affidavit of the facts, without the pretended widow having been first duly cited

Statement.

T. SMITH died on the 16th of February, 1852, having duly executed his will on 25th April, 1837, in which he named T. H. and W. W. executors and universal legatees in trust, and directed them to convert the whole of his personal property into money, to invest the same in the funds, to pay the interest thereof to his wife, Hannah, during her life, at her decease to his daughter-in-law, Eliza Tugwood, during her life, and at her death, to his grandchildren absolutely.

His said wife, Hannah, and W. W. died in his lifetime, and T. H. survived the testator, but died without having proved the will.

On the 6th May, 1850, the testator was married to Elizabeth Flavell, widow, who is still living.

An affidavit of J. S., an old and intimate friend of the testator, and of his wife's family, to the effect that Elizabeth Flavell is the natural and lawful sister of the testator's first wife, Hannah, was brought in with the certificates of the two marriages annexed.

Counsel now moved the Court to decree letters of administration (with the said will annexed) to be granted to the said Eliza Tugwood, and submitted that there was sufficient proof of the nullity of the second marriage, and that, consequently, the said will was not thereby revoked.

SIR JOHN DODSON. What is stated may be perfectly true, but it is a matter of too great importance for the Court to decide upon the single affidavit which is before it. J. S. certainly states himself to be an old and intimate friend of the parties, and swears that the second wife was the natural and lawful sister of the first. In that case no doubt the marriage is null and void, and the will remains in force; still, I apprehend, the Court cannot, upon the evidence before it, entirely ignore the fact of the second marriage, and grant this motion without having the widow, or the pretended widow, cited. It may be true that she has been informed of this application, and has refused to make an affidavit of her own incest; but I think the Court is bound to require official notice to be given to her, and to have her cited, to show cause why letters of administration, with the said will annexed, should not be granted.

Judgment.

Proctors for Eliza Tugwood, *Thomas & Capes*.

1853.

PREROGATIVE
COURT OF
CANTERBURY.

Nov. 23.

Testator, having duly executed his will, became afterwards of unsound mind; and while in that state, destroyed it. Having partially recovered, he expressed regret, and gave directions for the preparation of another will to the same effect. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will.

Statement.

IN THE GOODS OF DAVID DOWNER, DECEASED.

DAVID DOWNER, late of Watford, in the county of Hertford, destroyed himself by drowning, on the 10th April, 1853, and at the coroner's inquest held upon his body a verdict of temporary insanity was returned.

The deceased was married on the 16th November, 1846, and in the month of October, 1850, being then of perfectly sound mind, gave instructions for his will to Henry Fellows, his brother-in-law, a farmer, near Watford, and requested him to prepare it in accordance therewith. But Mr. Fellows, deeming it right to have professional assistance in the matter, gave the instructions, with the concurrence of the deceased, to his own solicitor, Mr. Clark, who thereupon drew a will in accordance therewith, giving the whole of the property of the deceased to his wife, Ann Downer, and appointing her and Mr. Fellows executors. This will was duly executed on the 27th October, 1850.

In the spring of 1851, the deceased began to show symptoms of derangement of intellect, which continued to increase until the deceased was generally believed by his friends and relations to be of unsound mind.

On a Monday evening in the month of October, 1851, the deceased being at the time very violent and wild in his conduct, suddenly left the room in which he had been sitting with his wife at his house at Watford, and fetched the said will from a box in which he kept it, and attempted to destroy it by putting it in the fire, which, however, his wife on that occasion prevented. But on the following Monday, the deceased being then wholly devoid of his reasoning faculties, succeeded in destroying the said will by cramming it into the fire with a poker.

In the course of the following November, the deceased appeared in a measure to recover from his attack, and frequently expressed great regret at having destroyed his will.

Early in March, 1853, the deceased called on Mr. Fellows, and asked him whether he would get another will drawn up the same as before, whereupon he asked the deceased what he had done with the will, to which the deceased replied, "That time I was mad, I burnt it," and expressed great regret at having so done. Mr. Fellows thereupon promised that when he had occasion to go to London, he would get another will prepared to the exact purport and effect of the one destroyed.

But on the 29th of the same month, Mr. Fellows again saw

the deceased, and became satisfied, from the great alteration in his manners and appearance, that he was relapsing into his former state of madness.

The deceased had always refused to see any medical attendant, but on the 9th April, when he was very bad, his wife called in Mr. Bidcock, a surgeon at Watford, to see him. He prescribed for him, but on the same day the deceased left his home and did not return till the following day, when, after remaining at home for a short time, he again left the house, and then drowned himself.

Several affidavits fully verified these circumstances; an affidavit also of Mr. Clark, the solicitor, with the original instructions, and the original draft of the said will annexed, proved the perfect accordance of this draft with the will of the deceased, as executed, whereupon

Dr. Bayford moved the Court to decree probate of the said draft of the said will, as containing the substance, purport, and effect of the will of the said David Downer to be granted to the executors named therein, by reason of the said deceased having destroyed the original thereof whilst of unsound mind.

SIR JOHN DODSON. From the affidavits made in this case there can be no doubt that the deceased was of unsound mind, and that while in that state he destroyed the will. There was, therefore, no *animus revocandi*, and I think the executors are entitled to probate of this draft.

Proctor for the executors, *Scurlock*.

1853.
IN THE GOODS
OF DAVID
DOWNER,
DECEASED.
Statement.

Judgment.

LUCAS, OTHERWISE JOHN, *against* JOHNSON, IN THE GOODS OF JOHN LUCAS, DECEASED.

PREROGATIVE
COURT OF
CANTERBURY.

Nov. 23.

JOHN LUCAS, late of Calcutta, in the East Indies, merchant, died on the 3rd June, 1828, having duly executed his will appointing Constantine Pandazie (since deceased), and his son, John Lucas, otherwise Lucas John, his executors.

Testator died in the East Indies, leaving property in England. His son and executor, J. L., being in Calcutta, his attorney, J. J., took out the usual letters of ad-

On the 6th May, 1844, letters of administration, with the said will annexed, limited to the estate and effects within the province of Canterbury, were granted by authority of this Court

administration and afterwards brought into the registry an inventory, and an account which showed a large balance. J. L. having afterwards himself applied for and obtained probate, and J. J.'s authority being thereby terminated, a proctor appeared for J. L., and exhibited a special proxy; and the Court, on his petition, granted a monition to J. J. to pay the balance of the said account which had been allowed, to him, the said proctor, for the use of his party.

1853.
 {
 LUCAS,
 otherwise
 JOHN, against
 JOHNSON,
 IN THE GOODS
 OF JOHN
 LUCAS,
 DECEASED.
 Statement.

to John Johnson, as the lawful attorney, and for the use and benefit of the said John Lucas, otherwise Lucas John, then residing in Calcutta, and until he should duly apply for and obtain probate of the said will to be granted to him.

On the 8th December, 1852, Mr. Johnson voluntarily exhibited and brought into the registry of the Court an inventory of the goods, and an account of his administration thereof, which showed a balance of 1602*l*. 18*s*. 2*d*.

On the 26th June, 1853, the executor, Mr. John Lucas, duly applied for and obtained probate of the said will, whereby the authority of the said letters of administration ceased.

On the 16th of July, a proctor appeared for Mr. Lucas, and on the 4th of August,

Dr. *Twiss* moved the Court to grant a decree against John Johnson "to show cause why his account, heretofore brought into and now remaining in the registry of this Court, should not be examined and allowed by the Judge or his surrogate; and why he, the said John Johnson, should not dispose of the rest of the limited goods, chattels, and credits of the deceased which should be found remaining on his said account, in such manner and form as should be limited by the discretion of the said Judge or his surrogate, with the usual intimation."

This decree, with intimation, was granted; and was afterwards personally served on Mr. Johnson, and duly returned into Court on the caveat day in October, the certificate being continued.

On the 2nd session of Michaelmas Term, November 14, in pain, &c., the proctor exhibited a further proxy under the hand and seal of his party, and the Judge, at his petition, admitted the contents of the inventory and account exhibited by John Johnson, and decreed a monition against the said John Johnson "to pay the balance appearing on the said account, viz., the sum of 1602*l*. 18*s*. 2*d*," the certificate of the decree being continued to the 3rd session.

A question, however, then arose as to the person to whom Mr. Johnson should be monished to pay the balance appearing on his account, insamuch as Mr. John Lucas, otherwise Lucas John, the executor, was still residing in India, and had no agent in this country specially authorized to receive the money in his behalf. Consequently considerable delay with regard to ulterior proceedings, in the event of the monition to pay the balance not being obeyed, would be occasioned, by the necessity of communicating with the executor himself, and of obtaining from him an affidavit to the effect that he had not received the money.

Under these circumstances it was suggested that the proxy

exhibited in the cause invested the proctor with authority to receive the said balance. It was to this effect: "I hereby nominate, &c. &c. to exhibit this, my special proxy, and by virtue hereof to pay and procure the rest and residue of the limited goods, chattels, and credits of the said deceased which shall be found remaining on the account of Mr. Johnson, to be examined and allowed by the said master keeper, &c., and the said John Johnson to be ordered and decreed to dispose thereof in such manner and form as shall be limited and appointed by the said Judge or his surrogate; and in default thereof, to pray the said Judge or his surrogate to permit the bond or obligation given and entered into by C. W. G. and J. F. E., together with the said John Johnson, for his faithful administration of the limited goods, &c., to be sued for at Common Law; and on the same being so sued for, to permit the said bond to be attended with and produced as may be requisite and necessary for the furtherance of justice, and generally to do, perform, and execute all such other acts, matters, and things as shall or may be requisite and necessary to be done for me, and in my name herein."

Dr. *Twiss* now moved the Court to direct that, by the monition decreed on the 2nd session of the Term, Mr. Johnson shall be monished to pay, or cause to be paid, the said sum of 160*l.* 18*s.* 2*d.*, being the balance remaining on his account, the said account being comprised in the inventory of the goods of the deceased, heretofore brought into and now remaining in the registry of this Court, to Charles John Middleton, the original proctor of the said John Lucas, for the use of his party, within such time as the Judge should think fit to limit and appoint.

THE COURT granted the application.

Proctor for the executor, *Middleton*.

1853.
 {
 LUCAS,
 otherwise
 JOHN, against
 JOHNSON,
 IN THE GOODS
 OF JOHN
 LUCAS,
 DECEASED.

IN THE GOODS OF VINCENZO FEDERICI, OTHERWISE VINCENT FREDERICI, DECEASED.

THE deceased in this case was Superintendent of the Imperial Royal Conservatory of Music at Milan, and died in September, 1826, having first duly made his last will and testament in conformity with the laws in force at Milan, without having appointed any executor thereof, but having therein named Cattarina Mella, spinster, universal legatee.

Mademoiselle Mella caused the said will to be duly registered and deposited in the archives of the Imperial Royal Civil

CONSISTORY
COURT OF
LONDON.

Nov. 25.

AN Austrian
subject in
Milan, by a
legal will, in
which no
executor was
appointed,
made C. M.,
spinster, uni-
versal legatee.
C. M. was duly
put in posses-

1853.

IN THE GOODS
OF VINCENZO
FEDERICI,
otherwise
VINCENT
FEDERICI,
DECEASED.

Statement.

sion of the estate of the deceased, by authorities at Milan, and afterwards duly executed, according to the law of Milan, an irrevocable deed of gift of all her estate in favour of Madame R. C. and shortly afterwards died intestate. Madame R. C. was duly put in possession of the estate in Milan. It being afterwards discovered that the testator was entitled to 1000*l.* under some proceedings in Chancery in England, and application being made to this Court, it decreed letters of administration, with the will annexed, limited to the estate taken under the deed of gift, to Madame R. C., the donee, upon an affidavit of the Austrian consul, verifying the documents produced, being left in the registry.

Judgment.

Tribunal of First Instance at Milan; and in the month of October, 1826, she was, by order of that Court and pursuant to the said will, duly put into possession of the estate and effects of the said deceased in Milan.

On the 16th May, 1836, Mademoiselle Mella duly executed, conformably to the laws of Milan, an irrevocable deed of gift of all her estate and effects in favour of her niece, Madame Rosa Castiglioni (wife of Paolo Castiglioni), formerly Moro, spinster. This deed of donation had been duly accepted by Madame Castiglioni and her husband, and in virtue thereof they had been duly put in possession, by the authorities at Milan, of the estate and effects of the deceased there situate.

On the 22nd July, 1836, Mademoiselle Mella died intestate. It had only recently been discovered that the said Vincenzo Federici died possessed in this country of a sum of about 1000*l.*, due to him under certain proceedings in the Court of Chancery.

This fund Monsieur and Madame Castiglioni claimed to be entitled to under the said will and deed of gift.

An affidavit of Monsieur Rosaz, a French advocate in this country, to the effect that Madame Castiglioni had been put in possession, by the Milanese authorities, of the estate and effects of the deceased there situate, by virtue and in pursuance of the will and deed of gift, was brought in with official copies in the Italian language of the will and deed of gift, and with translations thereof annexed thereto.

An affidavit was also brought in, sworn by Mr. Adolphus Bach, a counsel of the German law, and the German legal adviser of the Imperial Legation of Austria in this country, to the effect that "by the civil law of Austria in force at Milan, the said will of the deceased is a good and valid will, and has been duly recorded as such by the Tribunal of First Instance at Milan, *as appears by the said exhibits, &c.*"

Sir *J. D. Harding* Q. A. moved the Court to grant letters of administration (with the will annexed) of the estate of the said Vincenzo Federici to Madame Castiglioni.

DR. LUSHINGTON. The difficulty which I feel in this case is, that nobody has made an affidavit as to the correctness of the documents before the Court. The affidavits no doubt sufficiently prove the law of Austria, and the legal effect of these documents, assuming them to be correct. The application is very peculiar; and I think myself bound, therefore, to require some verification of the documents. There would, I apprehend, be no difficulty in obtaining an affidavit from Milan, or from the Austrian consul in England. I should be quite content, and I

think, Mr. Registrar, the grant may pass, upon an affidavit of the Austrian consul being left in the registry that he verily believes these documents to be what they purport to be. The grant must be limited to the estate taken under the deed of donation.

Proctor for Madame Castiglioni, *Pritchard*.

1853.

IN THE GOODS
VINCENZO
FEDERICI,
otherwise
VINCENT
FEDERICI,
DECEASED.
Judgment.

IN THE GOODS OF RICHARD HILHOUSE, ESQ., DECEASED.

PREROGATIVE
COURT OF
CANTERBURY.

Dec. 3.

THE deceased died on the 9th October last, leaving a will duly executed, and bearing date 29th July, 1840. He also left a paper writing, purporting to be a codicil, and to bequeath various legacies, and bearing date 4th July, 1850. This was signed by the deceased; but, although there was a full and perfect attestation clause, there were no witnesses thereto. On the 8th October, 1853, he duly executed, in the presence of two witnesses, what purported to be a *second* codicil to his will.

Probate decreed of an unattested paper purporting to be a first codicil, dated 4th July, 1850, and a duly executed codicil, dated 8th October, 1853, as together containing a codicil to the will.

Statement.

It appeared from the affidavits brought in, that both the codicils were prepared by E. S. the deceased's solicitor; that in or about the month of July, 1840, the deceased handed the first to his wife to deposit with his will, which she did, and that it so remained with the will until after deceased's death; that shortly before his death, as he expressed a desire that some other friends should receive a small token of remembrance, his sons thought it advisable that a codicil should be drawn for that purpose, and, with his consent, gave instructions to E. S. to that effect; that this was read over to, and approved by the deceased, who thereupon duly executed it.

It commenced thus, "This is a *second* codicil to the will of me," &c.; and, among other legacies, it bequeathed some to three of his grandchildren, in these words, "I give to each, &c., the sum of 500*l.*, at the same time, and subject to the like provisions *as are contained in my first codicil* with regard to the like legacies to my three other grandchildren." To one of the legatees it gave the sum of nineteen guineas "to be in addition to the annuity given to her by the *said first codicil*;" and to another, "a *further* legacy of 50*l.*" These references all corresponded with the dispositions in the unattested paper, dated the 4th July, 1850; and no other testamentary paper appeared.

Dr. *Addams* moved the Court to decree probate of the will and two codicils to be granted to the executors; and submitted

1853.
 IN THE GOODS
 OF RICHARD
 HILHOUSE,
 Esq.,
 DECEASED.

that the reference in the duly executed codicil to the unattested paper completely identified it, and entitled it to probate, notwithstanding the want of attestation.

SIR JOHN DODSON. I have no doubt whatever from the circumstances of this case, and from the distinct references in the later instrument, that the former is sufficiently identified to be entitled to probate. My only doubt is, whether I should decree it as prayed. By doing so, I should pronounce an unattested paper to be a codicil. I apprehend the more correct course would be to consider the former incorporated in the latter, and decree probate of the will and the two paper writings as together containing a codicil to the will.

Decree accordingly.

Proctors for the executors, *Thomas & Capes*.



PREROGATIVE
 COURT OF
 CANTERBURY.

Dec. 9.

E. A. N., a spinster, having invested money in the funds, and described herself as E. A. R., widow, and afterwards invested other money in her right name, the Court refused to decide the question of identity by granting a special probate of her will, which was in her right name, and showed no ambiguity.

Statement.

IN THE GOODS OF ELIZABETH ANN NEALE, SPINSTER, DECEASED.

ELIZABETH ANN NEALE, late of Welford Cottage, King's Road, Chelsea, died on the 7th of November, 1853, leaving a duly executed will, of which H. A. and C. G. B. were executors.

It appeared from the affidavit of H. A., *that* some months before her death she had informed one of her executors that she had invested some moneys of her own in the funds in the name of "Russell" instead of Neale; *that*, after her death he found amongst her papers, in a cash box belonging to her, stock receipts dated from September, 1845, to September, 1851, for sums amounting in the whole to 2336*l.* 0*s.* 11*d.* 3½ per cents. in the name of "Elizabeth Ann Russell." The deceased was also possessed of 3000*l.* 3½ per cents., in her correct name, which was purchased out of the estate of her late father, whose sole executrix and residuary legatee she was.

An affidavit of Mrs. Howard, a cousin of the deceased, proved *that* deceased was in the habit of visiting her in York Street, Blackfriars Road; *that*, on one occasion, about eight years ago, she took with her a widow's cap and fall, and having dressed herself therein, left the said house, and returned in about two or three hours, but made no mention of the object of her disguise; *that*, on several occasions the deceased informed Mrs. Howard that she had invested several sums of money in the funds in the name of Elizabeth Ann Russell (Russell being

Mrs. Howard's maiden surname); that the first of such investments was made on the occasion when she disguised herself in the widow's cap and fall; and that she did so in order that her father might not know she had money invested in the funds, &c.

Upon inquiry at the Bank of England, since the deceased's death, it was found that the said investments had been made in the name of "Elizabeth Ann Russell, of York Street, Blackfriars Road, *widow*."

Counsel moved the Court to decree a special probate of the said will of the deceased to issue to the executors, with the following addition to the deceased's description therein, to wit,—"in the books of the Governor and Company of the Bank of England, also described as Elizabeth Ann Russell, of York Street, Blackfriar's Road, widow;" and submitted that the affidavits of the circumstances, and the finding of the bank receipts among deceased's papers, sufficiently established the identity.

SIR JOHN DODSON. I am not quite satisfied that there is evidence sufficient to establish the identity. In such a case, the strongest evidence that can be got should be produced; and I think I should have had an affidavit from the broker employed in the transaction. No doubt he could be found. But there is another ground on which I shall reject this motion. There is no ambiguity or difficulty whatever arising from the will itself, and therefore I apprehend it to be no part of the duty of the Court of Probate to take upon itself the decision of this question of identity. It appears to me that that is entirely a question for the authorities of the Bank of England, and that neither they, nor the parties concerned, have any right, in a case so approximating to fraud, to throw the responsibility of its decision upon this Court. I reject the motion.

Proctors for the executors, *Wills*.

1853.

IN THE GOODS
OF ELIZABETH
ANN NEALE,
SPINSTER,
DECEASED.
Statement.

Judgment.

IN THE GOODS OF JOHN HENRY OGDEN, DECEASED.

THE deceased died intestate on the 16th of September, 1853, leaving Mary Ann Ogden, his lawful relict, and some cousins

PREROGATIVE
COURT OF
CANTERBURY.

Dec. 9.

The widow of
the deceased,
being confined

under the Queen's warrant as a criminal lunatic, letters of administration were granted absolutely to a cousin german as next of kin, no medical certificate of insanity being required.

1853.

IN THE GOODS
OF JOHN
HENRY OGDEN,
DECEASED.
Statement.

german, the parties entitled in distribution to his personal property, which amounted to about 200*l*.

On the 2nd of July, 1849, Mary Ann Ogden, his wife, was indicted for the wilful murder of her child; but upon her arraignment in the Central Criminal Court, was found to be insane by a jury lawfully impanelled, so that she could not be tried upon such indictment; whereupon she was ordered to be left in strict custody until her Majesty's pleasure should be known. She was accordingly confined in Horsemonger Lane Gaol until the 6th of April, 1850, when she was removed under her Majesty's warrant to Bedlam Lunatic Asylum, where she still remains confined as a criminal lunatic.

These facts were deposed to by S. F., one of the next of kin, and G. E., the criminal prisoners' clerk in the office of the Secretary of State for the Home Department, but no affidavit was brought in, according to the usual practice, from any medical attendant. (*a*)

Counsel moved the Court to decree letters of administration of the goods of the deceased to be granted to S. F. the lawful cousin german, and one of the next of kin, "for the use and benefit of the said Mary Ann Ogden, widow, the relict of the said deceased, during her lunacy, and until she shall become of sound mind."

Judgment.

SIR JOHN DODSON. There is no necessity for the limitation. It is in the discretion of the Court to make the grant either to the widow or to the next of kin; and it may at any time, upon good and sufficient cause being shown, prefer the next of kin to the widow. In the present case, the widow being confined as a criminal lunatic is surely a valid reason for passing her over. An absolute grant may pass to the next of kin,

Proctor for the next of kin, *Scurlock*.

(*a*) The medical officer of the lunatic asylum declined, it is understood, to make an affidavit of the widow's insanity, on the ground that he could not do so conscientiously;

as, notwithstanding the position in which she stood, he believed her now to be perfectly sane, and capable of managing herself and her affairs.

ARCHES
COURT OF
CANTERBURY.
4th Sess.
Mich. Term.
Nov. 28.

A church-
warden pro-
ceeded against
for brawling
and laying vio-

THE OFFICE OF THE JUDGE PROMOTED BY BURDER AGAINST SELMES.

THIS was a cause or business of the office of the judge promoted in virtue of letters of request from the Consistorial Episcopal Court of Chichester, by John Burder, the secretary of

the bishop of the diocese, against Henry Selmes, of the parish of Beckley, in the county of Sussex, for quarrelling, chiding, and brawling by words, and for smiting and laying violent hands upon a person of the name of Thomas Fuller, in the chancel of the parish church of Beckley, on the afternoon of Sunday, the 5th June, 1853, whilst persons were therein assembling for public worship.

Articles were brought in to the following effect:

First. *That* by the laws, statutes, and canons ecclesiastical of this realm, all and every the parishioners and inhabitants of and within every parish within the said realm, and all other persons whatsoever, ought, when they repair to their parish church, or any other church or chapel, upon any occasion whatever, to conduct themselves, orderly, soberly, peaceably, and reverently therein, as becometh the house of God, and not to chide, brawl, scold, quarrel, or make any disturbance whatever therein, or lay violent hands upon any person therein, upon pain of ecclesiastical censures, to be inflicted according to the offence. (a)

Second. *That* Henry Selmes, on Sunday, 5th June, 1853,

(a) This proceeding was taken under the general law, and not under the stat. 5 & 6 Edw. 6. c. 4., "which," said Lord Stowell (*Hutchins v. Denziloe*, 1 Hag. Con. 181.), "did not create the offence, as it subsisted by the common law before the statute was enacted, and there is no doubt that the Ecclesiastical Court had a right to intervene to correct or punish any act of disturbance of the public worship. A party may now proceed either upon the statute or upon the ancient law." This was also so held by Sir H. Jenner Fust, in the case of *Taylor against Morley*, 1 Curt. 481., where objection was taken that the Ecclesiastical Court had no jurisdiction in such matters except under the statute, and the learned Judge observed, "In many cases it is advisable to proceed under the general law, because the statute requires two witnesses in proof of the charge; while, under the general law, one witness to certain words, and one to circumstances, is sufficient, and it may not always be in the power of a party to produce two witnesses in support of the specific charge." Another distinction between the proceedings under the general law and under the statute, in such a case as the present, is the discretion of the Court as to the punishment; for, in *Hoile v. Scales*, 2 Hag. Ec. 595.,

Dr. Lushington said, "What are the consequences of a conviction in my mind that the proofs establish a violation of the statute? Here the Court has no discretion, the words of the statute are imperative, 'If any person or persons shall smite or lay violent hands upon any other either in any church or churchyard, then, *ipso facto*, every person so offending shall be deemed excommunicate.' This is the penalty for the offence of smiting in a sacred place, and the Court has no power to alter or vary it. But since the passing of 53 Geo. 3. c. 127., the consequences of a sentence of excommunication are very different from what they were previously, for the ancient punishment of excommunication is taken away; and the person excommunicated incurs no civil penalties except such imprisonment as the Court in the exercise of its discretion may think proper to direct,—not exceeding six months." In that case the Court pronounced the defendant excommunicate, and that he be imprisoned for seven days and pay the costs of the suit; but as the counsel for the promotor did not press the Court to proceed to the execution of the sentence, no *significavit* issued, and the defendant, therefore, suffered no imprisonment.

1853.

THE OFFICE
OF THE JUDGE
PROMOTED BY
BURDER
against
SELMES.

lent hands upon a person in the church, under the general Ecclesiastical Law, and not under the Statute. An affirmative issue being given, he was monished to abstain for the future, and was condemned in costs.

Pleadings.

1853.

THE OFFICE
OF THE JUDGE
PROMOTED BY
BURDER
against
SELMES.
Pleadings.

whilst persons were assembling in the parish church of Beckley, for public worship, at the usual hour of divine service, and whilst Thomas Fuller, a parishioner of the said parish was quietly and peaceably in occupation of a certain pew in the chancel of the said parish church, entered the church, accompanied by several men (who had been previously engaged by him to commit the offence, and one of whom was his groom), and proceeded with them to the pew in which T. F. then was, and directed him to leave the pew; *that* on the said T. F. declining to do so by reason that he had been authorized by the rector of the parish to occupy the said pew, H. S., in a brawling, chiding, and quarrelsome manner, directed the men, to the number of four or five, to climb into the pew, and lift the said T. F. out of the pew, and himself assisted them in so doing, and laid violent hands on the said T. F., and forcibly and violently pushed him, and assisted the men to turn him out of the pew, and thereby created a disturbance in the church, to the great scandal of the persons therein assembled for public worship, and in violation of the aforesaid laws.

Third. *That* the said H. S. was duly nominated churchwarden by the rector, and was duly admitted into the office of churchwarden of the parish, and *that* at the time of the commission of the said offence he was churchwarden of the said parish.

Fourth, fifth, and sixth. The jurisdiction and the usual concluding article.

These articles having been admitted on the third session of Michaelmas Term without opposition, and an affirmative issue having been given, the Court now gave sentence.

Argument.

Dr. R. Phillimore (Dr. Deane with him) appeared for the promoter, and said he was instructed by the Bishop of Chichester, whose only object in causing the writ to be promoted was to maintain decency and order in places of public worship, to ask the Court to pass a lenient sentence on Mr. Selmes. He therefore prayed the Court merely to admonish him to abstain from such conduct in future, and to condemn him in the costs of the proceedings.

Dr. Addams appeared for Mr. Selmes. He thought there was no necessity for the suit whatever. Mr. Selmes was the churchwarden of the parish, and it was to be presumed that he was only acting in the discharge of what he considered a duty. He thought it a case in which the Court would not condemn the defendant in the whole costs, but only in a sum *nomine expensarum*.

SIR JOHN DODSON. Mr. Selmes having given an affirmative issue, there is no necessity for the Court to enter into the particulars of the charge. He has clearly committed and admitted an offence under the Ecclesiastical Law; and though I think it probable that he proceeded to greater lengths than he originally intended, and may perhaps have misconceived his duty, yet the Court is bound to admonish him to abstain from such conduct in future, and to condemn him in the costs, which cannot be very heavy.

Proctors for the promoter, *Bathurst*; for the defendant, *Roberts*.

1853.

THE OFFICE
OF THE JUDGE
PROMOTED BY
BURDER
against
SELMES.
Judgment.

MONEY *against* MONEY.

THIS was a suit brought by letters of request from the Diocesan Court of Bath and Wells, by Edward James D'Oyley Thrale Money, against Harriet Catherine Elizabeth Money, his wife, for restitution of conjugal rights. She pleaded her husband's cruelty in bar, and prayed a divorce.

Currey, the husband's proctor, having in the commencement of the suit retained but one counsel, *Tebbs*, the proctor for the wife, also retained one counsel only, the Queen's Advocate. In this manner the case proceeded till towards the end of Trinity Term last, when the evidence having become very voluminous, *Tebbs* inquired in the Registry whether a second counsel might not be allowed, but was informed, that under the circumstances of the case, if the husband was content with one counsel, the costs of a second counsel would not be allowed to the wife.

The case then proceeded for hearing, and *Tebbs* took the papers to the Queen's Advocate, who thereupon required the assistance of another counsel, and said that he, *Tebbs*, was bound, by his professional duty to his party, to insist upon her right thereto. On further reference to the Registry, *Tebbs* was informed that a second counsel would be allowed, as it was discovered that it had been allowed in a similar case. A correspondence ensued between the proctors, which led to nothing; but on the cause coming on for hearing the Queen's Advocate submitted to the Court that he could not do justice to so heavy and intricate a case without the assistance of a junior counsel, and that Mrs. Money was entitled to have one. The Court having intimated its opinion to that effect, *Tebbs* retained a second counsel to argue the case on behalf of Mrs. Money; and the costs and expenses of this counsel were allowed by the

ARCHES
COURT OF
CANTERBURY.

Nov. 28.

In a matrimonial suit, the husband retained one counsel only, and the wife's proctor, conceiving she could not claim the privilege of two, also retained one only, but for the hearing was induced to retain a second. The costs thereof being allowed upon taxation, the proctor for the husband objected to the Registrar's report. — *Held*, that the ordinary practice of the Court was to have two counsel on each side; that a wife was *prima facie* therefore entitled thereto; and that the special circumstances of the present case did not afford sufficient ground for exception.

1853.

MONEY
against
MONEY.

Statement.

Registrar upon taxation. *Currey* excepted to the Registrar's report allowing the costs of such second counsel against the husband, and brought in an act on petition in objection thereto, and prayed that the bill might be referred again to the Registrar for taxation.

This question was argued before the Court proceeded with the hearing of the principal cause.

Pleadings.

Dr. *R. Phillimore*, in objection to the report. The decision of the Court will form a precedent for future cases. It must be given on two grounds: first, upon the general principle; and secondly, upon the general circumstances of the case. The general principle that a wife is allowed counsel at the expense of her husband, is only a corollary to the proposition that she is entitled to receive necessaries from him as long as she is not divorced. The principle is laid down in *Shelford on Marriage*, 650. There can be no absolute rule that the wife, irrespective of circumstances, is entitled to two counsel. It must be a question of degree, not of fixed principle. A pauper was entitled to counsel, but the Court never assigned two. A husband might have an income of 50*l.* per annum only, and yet be unable to take the oath that he was a pauper; it would be absurd to say that the Court would compel him to find his wife two counsel. Mr. Money had paid a large bill of costs; and if his resources will not allow him to avail himself of two counsel, his wife cannot claim two. She would thereby be placed in a position of inequality and advantage, not of equality and justice.

With regard to the special circumstances of this case, the letter of Mrs. Money's proctor put him out of Court. The Queen's Advocate might be fully justified, especially in a case of such difficulty and publicity, in demanding the assistance of a second counsel, but that will not affect any agreement which has been made. The proctor is *dominus litis*, and can therefore bind his client. In the letter of Mrs. Money's proctor is a direct and positive acknowledgment of an agreement subsisting between the two proctors that there should be only one counsel on each side, and Mrs. Money must be bound by it. The proctor is barred from giving his consent to the employment of a second counsel.

Sir *J. D. Harding*, Q. A., in support of the report.

It is hardly possible to exaggerate the importance of this question. There can be nothing more alarming to a client, nor more opposed to the first principles of justice, than that he is bound by whatever his proctor writes or says out of Court with a view of expediting a cause. Suppose one proctor said to another that he was anxious to have the case heard on a given

day, and that if he would facilitate it, he would undertake not to appeal it, could the client be bound by such an undertaking? Certainly not. On the contrary, the client might compel him to prosecute the appeal; he must discharge his duty. His proxy only binds him to do what is lawful; it could not extend to everything said out of Court. If the proctor has made the agreement referred to, Mrs. Money is not to be bound by it. The proctor has endeavoured to carry out the alleged agreement as far as he can; but when I saw the injury likely to arise to my client from persisting in it, I used my utmost exertions to overthrow the arrangement. Mrs. Money's proctor had derived an impression from what he heard in the Registry, that he was entitled to one counsel only, and under that impression made the agreement. It was made under complete ignorance of the circumstances, and as soon as he found that he had been misinformed, he repudiated it. No practical harm has been done to Mr. Money. The whole transaction is highly creditable to Mrs. Money's proctor, who was unwilling to put the husband to expense; and the step he has taken now, was adopted under the advice of his counsel, who could not permit Mrs. Money to be deprived of her rights. With respect to Mr. Money's pecuniary resources, he has stated in answer to an interrogatory that the sum over which he has a disposing power, in a will executed since his marriage, is about 7000*l.* subject to an annuity of 100*l.* That is his private property, in addition to his pay as a lieutenant in the Bombay Native Infantry. According to the principles laid down in *Shelford*, the wife is entitled to necessities. Can any one look at the bulk of papers in this case, and say that a second counsel is not necessary? If ever there was a case in which it was requisite, it is this. It is not pretended that Mrs. Money has a single shilling beyond what her husband allows her.

SIR JOHN DODSON. It has been contended by the learned counsel for Mrs. Money, that neither upon general principles, nor upon the special circumstances of the case, was the wife entitled to the benefit of a second counsel, and consequently that the report of the Registrar could not be allowed. With regard to the general principle, according to the law and practice of the Court, the usual course is to have two counsel on each side, subject to certain exceptions. This case has been brought before the Court by the husband himself, by virtue of letters of request, in which he has stated that he was desirous of proceeding in this Court, because in the Court below the parties would not have the benefit of counsel such as they had

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Money
against
Money.
Argument.

Judgment.

The practice of the Court is to have two counsel.

This is not a case in which the Court would be inclined to depart from its ordinary practice.

1853.

MONEY
against
MONEY.

Judgment.

Wife is entitled to necessaries; and if law proceedings are necessary for her protection, the husband is liable for the proper and necessary costs thereof.

The wife is not to be barred of her right to two counsel by reason of what has passed between the two proctors out of Court.

here. It is, therefore, *primâ facie*, a case in which the Court would not be inclined to depart from its ordinary and usual practice. It certainly is a case, so far as I have been able to look into it, attended with very considerable difficulty, and one in which the Court would require the aid of counsel beyond what it would do in ordinary cases. It appears to me to abound with difficulties. The pleadings are very long, and a large number of witnesses has been examined; some on subjects of medical and surgical science. It is admitted that the wife is entitled to necessaries; and if proceedings at law are necessary for her protection, she is entitled to have her expenses paid by the husband, if he is able to pay them.

Now, do the special circumstances of the case exempt the husband from liability to the payment of two counsel for his wife? If his entire income had amounted to only 108*l.* per annum, out of which he allowed his wife 100*l.* for sustentation, the Court might have been placed in considerable difficulty; but I do not know that I would, even on that ground, have exempted him from the payment of necessary costs. It appears, however, that in addition to an annual income of 108*l.* while absent from duty, he has received from 7000*l.* to 8000*l.* under the will of his father. It is admitted, that when in actual service he has larger pay, and it also appears he has other emoluments arising from other appointments which he holds. There is no ground, therefore, for saying that he cannot pay the necessary and proper expenses for conducting the case of his wife.

But it is said that an agreement has been entered into, that the wife has hitherto proceeded with one counsel only, and that Mr. Money has paid the costs up to the hearing. A correspondence has passed between the proctors, and it certainly does appear that there was an agreement, direct or implied, that the case should be heard with one counsel only on each side. It seems, however, that the husband having but one counsel, the wife's proctor, having received some erroneous information in the Registry, thought he should not be at liberty to retain two on her behalf. When the papers were put into the hands of the Queen's Advocate, he intimated that such was the nature of the case, that he could not undertake to conduct it alone; but upon being apprised of the understanding between the proctors, he did not press the subject further; on looking, however, into the papers he considered a second counsel necessary, and insisted upon having one. Notice was then given, without loss of time, to the other side, and no disadvantage has been sustained by Mr. Money in his having paid the costs at the time he did. The agreement or understanding entered

into by the proctors affords no reason for taking the case out of the general rule, by which the wife is entitled to the assistance of two counsel. Upon the general principle, therefore, as well as upon the special circumstances of this case, I must affirm the report of the Registrar, with costs.

Proctor for the husband, *Currey*; for the wife, *Tebbs*.

1853.
MONEY
against
MONEY.
Judgment.

CIOCCI *against* CIOCCI.

CONSISTORY
COURT OF
LONDON.
Nov. 8. &c.

THIS was a suit for divorce, *a mensâ et thoro*, promoted by Jemima Mary Bacon Ciocci against her husband, Raffaele Ciocci, by reason of his cruelty and adultery.

The libel was given in behalf of the wife on the 19th February, 1853, to the following effect:—

1st Article. Pleads the marriage of the said parties in the parish church of Brighton, on the 15th January, 1851.

2nd. In part supply of proof, exhibits and annexes a collated copy of the entry of the marriage in the Register Book.

3rd. Pleads the cohabitation of the parties, the consummation of the marriage, and their general reputation as husband and wife.

4th. Pleads generally cruelty and adultery from the very day of the said marriage, or from a very early period thereafter.

5th. Pleads—*That* on the evening of the marriage, about ten o'clock, the said R. Ciocci absented himself from the house, No. 8. Grosvenor Street, Grosvenor Square (to which they had repaired from Brighton immediately after the ceremony), and did not return until about two o'clock A. M. of the following morning, having spent the interval smoking and drinking at a restaurant in Golden Square, kept by an Italian named Cesarini. *That* during the succeeding fortnight, while they remained in London, the said R. C. in a similar way absented himself continually from his wife, constantly quarrelling with her without cause or provocation, and treated her generally with neglect and contumely.

6th. *That* for some time before, and at the time of and after the period of his said marriage, the said R. C. was suffering from venereal disease (a), for which he was attended by divers medical persons practising at Brighton and elsewhere; *that* knowing himself to be so affected with venereal disease, and in

Charge of cruelty in wilfully marrying while infected with the venereal disease, and communicating the same, not sustained.—*Held*, the wilful risk, without the actual communication of the disease, is not legal cruelty.

Husband's defence against the charge of association and adultery with various prostitutes, that he was agent for a society for their reformation, and associated with them solely from pure and laudable motives, *not sustained* by the evidence. Sentence of divorce by reason of adultery only.

Pleadings.

(a) In his answers, Mr. C. denied any other time. See the judgment, having had the disease at that or

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against
Crocci.
Pleadings.

spite of the warning given him by one or more of them very shortly before his marriage, viz., that he the said R. C. was not justified in marrying at the time when he did marry, the said R. C. did nevertheless contract a marriage and have sexual intercourse with his said wife; *that* the said R. C. did thereby communicate to her the venereal disease; *that* her health was thereby for a considerable period seriously impaired; *that* by this cause, as well as by the general unkind treatment of the said R. C., his said wife was reduced to a state of extreme debility, which confined her to the house until the 14th of March, 1851, when she quitted her husband's house, and has ever since lived separate and apart from him, and has never since resided either at Brighton or London.

7th. *That* within a month after the said marriage, R. C. was accused by a person called San Giovanni, one of his personal friends, then residing at Clarence Place, Brighton, with being at that time infected with the venereal disease; *that* the said R. C. did not deny, *but in effect, though not in words, admitted (a)* the same; *that* the said R. C., also within a month after his marriage, confessed to a female known by the name of Polly Miller, that he had been suffering from the venereal disease, and had communicated the same to his said wife.

8th. *That* ever since the marriage of the said R. C. and J. M. B. C. in the month of January, 1851, the said R. C. has been in the constant habit of consorting with prostitutes, both in London and in Brighton, generally late in the evening, and has been constantly seen walking and conversing with them.

9th. That the said R. C. was *in the habit of visiting at a house (b)*, No. 3. Shaftesbury Crescent, Pimlico; *that* on a Sunday afternoon occurring very shortly after the aforesaid marriage, the said R. C. called at the *said house and (c)* caught hold of the female servant, who opened the door; took indecent liberties with her person, endeavoured to push her into the parlour of the house, and solicited her to let him have sexual connection with her.

10th. *That* on divers other occasions the said R. C., both *in the said house in Shaftesbury Crescent (d)* and when he met the said female servant in the street, attempted to take indecent

(a) The words in italics having been objected to, were omitted in the libel when admitted as reformed.

(b) The words in italics were substituted for "was an intimate friend of Dr. Achilli, and a frequent visitor

at his house," struck out of the libel as originally brought in.

(c) Substituted for the words "of the said Dr. Achilli, and having inquired for the said Dr. Achilli."

(d) Substituted for "at Dr. Achilli's house."

liberties with her person, and solicited her to let him have sexual intercourse with her, and especially in the month of May or June, 1852, after the said servant had left *her service in the said house (a)*, the said R. C. endeavoured to induce her to go with him to Brighton, for the purpose of carrying on an adulterous connection with him.

11th. *That* on or about the 29th January, 1851, the said R. C. and his wife, J. M. B. C., returned to Brighton, and went to reside at No. 8. Clarence Square, where the said R. C. pursued his occupation as a professor or teacher of languages; *that* from and immediately after such his return to Brighton, the said R. C. went frequently to a brothel or house of ill fame in Gardener Street, and also to a brothel or house of ill fame in Carlton Street, in Brighton, and *that* he there habitually committed adultery with a person known by the name of Polly Miller, and divers other prostitutes.

12th. *That* after his wife separated herself from him, the said R. C. continued to reside in the house in Clarence Square for about four months, and habitually committed adultery with Emma Brown, his cook.

13th. *That* on the evening of a certain Saturday, in the month of June, 1852, R. C., then residing in London, met a certain female, known to be a prostitute, and accompanied her to a house of ill fame in Chelsea, where he passed the night, and committed adultery with her.

14th. *That* in the early part of the following month R. C. again met the said prostitute, late in the evening, in the neighbourhood of Vauxhall Bridge Road, walked about with her for two or three hours, took indecent liberties with her person, and solicited her to let him have sexual connection with her in the street, which she refused; *that* on divers subsequent occasions, in the summer and autumn of the said year, R. C. met the said prostitute in the streets of Pimlico and Chelsea, walked about with her, took indecent liberties with her, solicited her to let him have connection with her, and gave her money.

15th. *That* on or about 2nd November, 1852, the said prostitute received a letter *(b)* purporting to come from the said R. C., which letter is not now in existence, requesting her to call upon him at his lodgings, No. 16. Grosvenor Street West, on the following morning; *that* accordingly, and in consequence of the receipt of such letter *(b)*, she went to the said house and saw the said R. C., who asked her to accompany him to a magistrate

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against
Croccr.
Pleadings.

(a) Substituted for "the service of Dr. Achilli."

(b) The words in italics in this

article were not in the libel as originally brought in.

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against
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Pleadings.

and to deny having had connection with him, if questioned by such magistrate; that the said R. C. thereupon accompanied her in a cab to the police station in Cottage Row, Pimlico, into which he entered, she, the said prostitute, remaining in the cab; *that* after waiting for about half an hour, the said R. C. re-entered the cab, and accompanied her to the police station in Rochester Row, into which he entered while the said prostitute remained, as before, in the cab; *that* after an interval of some two hours the said R. C. again re-entered the cab, in which he proceeded with the said prostitute to a house in Shaftesbury Crescent, and thence to his aforesaid lodgings, No. 16. Grosvenor Street West, where the said prostitute remained alone with the said R. C. for two or three hours, during which time, the said R. C. committed adultery with her.

16th. *That* in the course of the few months immediately preceding the date of this libel, the said R. C. received another prostitute in his said lodgings, and committed adultery with her.

17th, 18th, 19th, and 20th. The usual formal articles, pleading the identity and diversity of the parties, and the jurisdiction of the Court.

An allegation was given in on behalf of the husband to the following effect:—

1st Article—Counterpleads the fourth article of the libel, and pleads *that* during their stay in London he devoted himself almost entirely to his wife, frequently escorting her to places of amusement and public resort, and making expensive purchases for her personal ornament, and doing everything else in his power to contribute to her gratification.

2nd. *That* about six weeks after their return to Brighton, on the 14th March, 1851, his wife, who, as well for some considerable period before, as at the time and ever since her said marriage, had been suffering from ill health, went, with the consent of her husband, on a visit to a friend of hers, resident at Cuckfield, in Sussex, for change of air; *that* her expressed intention at such time was, to be absent for a few days only, and then to return; but *that* instead of so doing, she, to wit, on the 2nd April following, signified to her husband, by means of a letter, addressed to him by her solicitor, that she was determined never to return to him, and never again to live and cohabit with him; *that* to such determination she adhered, though earnestly remonstrated with (by letter), and entreated to forego it, by her said husband; *that* from such time she carefully concealed her place of residence from him; *that* he, in vain, endeavoured to discover the same, and heard (directly) neither

from nor of his said wife until after an interval of about a year and a half, when, to wit, on the 10th January, 1853, he was served with the citation in this cause.

3rd. Exhibits and annexes certain letters.

4th. Counterpleads the 13th and 14th articles of the libel, and alleges *that* the said R. C. (who was, and is, a member of a certain society called the "Female Aid Society," established in Red Lion Square, London, and who, from the year 1850, had taken as he still takes, an active part in promoting the object of that society) sometime in the said month of July, 1852, for the first time, met and accosted a female, being the female meant or intended (obviously a woman of the town, and who has since been produced and examined as a witness in this cause on behalf of his wife, the said J. M. B. C.,) by the names of "Fanny Alexander," but who then, in answer to his inquiry, stated to the said R. C. that her names were Helen Alexander, in the said Vauxhall Bridge Road; *that* the said R. C., in conversing with the said female on such occasion, urged and endeavoured only to persuade her to abandon her course of life, and to put herself under the protection of the said society; *that* it is utterly untrue that he then or at any other time took indecent (or any) liberties with the person of the said female, or *that* on the said occasion or any other, he had sexual connection with the said female, or committed adultery with her.

5th. Counterpleads the 15th article of the libel; and with reference to circumstances therein mentioned, alleges *that*, in the evening of a day, early in the month of August, 1852, the said R. C. accidentally saw a fellow-countryman of his, named Guadaleta, conversing with a female (whom he immediately recognised as the female he had seen and conversed with, in the manner as and to the effect mentioned in the preceding article of this allegation), in the neighbourhood of his, Guadaleta's lodgings, in Gillingham Street, Pimlico, and into which lodgings the said Guadaleta presently entered with the said Fanny (or Helen) Alexander, though at such time the said Guadaleta was a candidate for the office of minister of the Italian Protestant Church, in Newman Street, Oxford Street, London; and in reference thereto, an advertisement had shortly before, to wit, on the 26th of the preceding month of July, appeared in the *Times* newspaper, calling upon any one who had aught to object to the moral character of the said Guadaleta, to communicate the same to the Rev. Mr. Glennie, one of the secretaries to the Society for the Promotion of Christian Knowledge; and *that* it was the circumstance of such advertisement, and his knowledge of the fact of the said Guadaleta being such candidate,

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Pleadings.

that induced the said R. C. to notice (as he did) the fact of the said Guadaleta taking the said female to his, Guadaleta's lodgings, as hereinbefore pleaded; *that* in the month of October following, the said R. C., who was and is the Italian translator of the said Society for the Promotion of Christian Knowledge, was induced (though with some reluctance) to mention what he had seen of the said Guadaleta's conduct aforesaid to the said Mr. Glennie, who was also honorary secretary to a committee of which the Rev. Mr. Burgess, the rector of Upper Chelsea, was a member, for the selection of minister for the Italian Protestant Church in London, and who again communicated such information to the said Rev. Mr. Burgess; whereupon the said Rev. Mr. B. had an interview with the said R. C., and requested of him (at least as understood by the said R. C.) some evidence of the improper (if improper) connection of the said Guadaleta with the said female; *that* in compliance with such, the request of the said Rev. Mr. B., the said R. C., not being aware of the residence of the said Fanny (or Helen) Alexander, or when or where he might fall in with her, he on the 2nd of November following, described her to a policeman on duty in Stafford Street, Pimlico, (believing that such was one of her haunts,) who said he well knew her, and promised to send her to his lodgings, No. 16. Grosvenor Street West, Pimlico, the next time he met her; for which purpose the said R. C. gave the said policeman a printed card, with his name and his said address; *that* on the evening of the said day, the said R. C. (being then in company with another fellow-countryman, a Signor Patriarchi), himself met accidentally the said Fanny (or Helen) Alexander, whom he had not seen since her previous interview with him hereinbefore pleaded, and requested her to come to his said lodgings on the following day, which she promised to do; *that* accordingly on the following day, November 3rd, the said Fanny (or Helen) Alexander went to the said lodgings, and found there the said R. C., and with him the said Signor Patriarchi, and when and where the said Signor P., in the presence of the said R. C., put certain questions to the said Fanny (or Helen) Alexander concerning her connection with the said Guadaleta; which questions, as also her answers thereto, he put down in writing, to wit, on the paper writing hereto annexed, marked No. 10. (a), (to which the party proponent prays leave

(a) On the 3rd of November, 1852, the following questions were addressed to Miss Helen Alexander, and answered as follows:—

1. Have you ever seen this gentleman walking with another gentleman in Shaftesbury Crescent?—Yes.

2. What day?—On the 4th of August, 1852.

3. If you see the gentleman could you know him again?—Yes.

4. Have you had anything to do with him?—Yes; I went with him that evening.

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Pleadings

to refer in part supply of proof of the premises), and to authenticate the same, added his signature thereto, as and where such signature now appears thereon; *that* after this had been done, the said R. C. (as conceiving that such was proper, if not necessary,) took the said Fanny (or Helen) Alexander with him in a cab to the police station, in Cottage Row, Pimlico, and thence (at the recommendation of the Police Inspector in Cottage Row) to the police court in Rochester Row, as pleaded in the said fifteenth article of the said libel, but not for the purpose therein most falsely pleaded, of inducing her to disclaim upon her oath any illicit connection between her and himself, which he neither had had, nor (to his knowledge) was believed or suspected to have had; but for the purpose, and no other, of having her sworn to the truth of the statement contained in her answers to the questions put to her as aforesaid by the said Signor P., relative to her illicit connection with the said Guadaleta, though such his purpose was frustrated, by the refusal of the magistrate, at the said police office, to swear the said Fanny (or Helen) Alexander to the truth of such statement; *that* the said R. C. thereupon went back in the cab to his said lodgings, at No. 16. Grosvenor Street West, taking the said Fanny (or Helen) Alexander back in the cab with him as far as it went her way, but set her down at the corner of Windsor Terrace, Pimlico, *that* (as she said) being near where she lived, and where she desired to be set down; which having done, the said R. C.

5. Did you stay with him all the night?—Yes.

6. At what o'clock did you left in the morning?—About eight o'clock.

7. What did he say to you during the night?—That he was going to leave that appartement; that next day was going in the country to pay a visit to some friends.

8. How much did he gave you?—Five shillings.

9. Have you seen him since that evening?—Yes, twice; once near Vauxhall Bridge, and another time in Belgrave Road.

10. What did he say to you?—That I am a very bad girl to go and tell to his friend every thing.

11. Where he lived?—At 39. Gillingham Street, Pimlico.

12. What part of the house had he?—The parlour, and de back parlour for his bedroom.

13. Did you really sleep with him?—Yes.

14. Have you been with him afterwards?—No.

15. Did any one see you in the house?—Nobody.

16. Have you seen this gentleman when you entered the house?—I did not; I thought he had go on away.

17. Have you seen him before that evening?—Yes; and I told him all my life.

18. What did he say to you?—He wished me to change my life, to go to servise; and he sayed that he would send me in an establishment at Red Lion Square, where they would take care of me, and so find me a place.

19. Were you glad to go and change your life?—Yes.

Would you go now?—No.

20. Make a description of the gentleman.—He is rather toll, and tin face, with large mouth, black wiskers, and bold.

21. Have you ever had anything to do with this gentleman?—Never.

(Witness) C. PATRIARCHI.

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returned alone in the cab to his said lodgings, where the said Signor P. then was expecting his return, and who spent the rest of the day with the said R. C.; *that* in his way home from the said police court, the said R. C. called at a house in Shaftesbury Crescent, as mentioned in the said fifteenth article of the libel, and went into it for a short time to speak to an acquaintance of his who resided there; but *that* he left the said Fanny (or Helen) Alexander, whilst he was so in the said house, sitting by herself in the cab at the street door; *that* the said Fanny (or Helen) Alexander was never at the said house, No. 16. Grosvenor Street West (at least to the knowledge of the said R. C.), save at the time, and for the purpose, and under the circumstances hereinbefore pleaded; *that* it is utterly false, as pleaded in the said fifteenth article, that she was again, or a second time, at the house on the said day, and that then and there, as falsely pleaded, (or at any other time or place,) he, the said R. C., had the carnal use and knowledge of the said Fanny (or Helen) Alexander.

6th. Pleads, *that* by the words "another gentleman," occurring in the question No. 1., and the words "the gentleman," occurring in the questions numbered 3. and 20. in the exhibit marked No. 10. annexed to this allegation, was meant or intended the aforesaid Italian, Signor Guadaleta, and *that* by the words "this gentleman," occurring in the questions numbered 1. 16. and 21., the words "his friend," occurring in the question numbered 10., and the word "him," occurring in the question numbered 17. in the same exhibit, was meant or intended Raffaele Ciocci, the party in this cause.

The cause was argued at great length, on several days, by Dr. R. Phillimore and Dr. Deane, on behalf of the wife; and Dr. Addams and Dr. Twiss, on behalf of the husband.

Judgment deferred.

Jan. 18. 1854.
Judgment.

DR. LUSHINGTON. This case has been fully discussed at the bar, the argument occupying no less than four days, and I think that time has been well spent; for on the present occasion the veracity of many witnesses is called in question, and the evidence is contradictory to a very great extent, and much time must necessarily be consumed in the investigation requisite to the discovery of the truth.

I must commence with stating a few of the admitted facts. The marriage took place on the 15th January, 1851. It appears that Mr. Ciocci was an Italian refugee, and for some years resident in this country; that he derived his maintenance by teaching languages, and, for some time previous to the marriage, at Brighton. The lady was Jemima Mary Bacop Frank,

The admitted
facts of the
case.
Marriage,
Jan. 15. 1851.

resided at Brighton and possessed a considerable fortune. The ages of the parties do not distinctly appear, but the lady was the elder.

There is enough in these circumstances to satisfy my mind, that, according to all probability, this was not a marriage likely to produce much happiness. The parties moved in a different sphere of life, and the fortune was well secured to the lady.

The parties separated on the 14th of March, 1851. What were the particular circumstances which led to this separation are not disclosed by the evidence in the cause. Much is very inconveniently left to the Court to conjecture. For instance, I know no fact immediately preceding March 14, 1851, which caused the co-habitation to cease. However, cease it did; and I find Mr. Ciocchi in London, and Mrs. Ciocchi elsewhere. From this time to the commencement of this suit, in Hilary Term, 1853, there is an entire blank, with one exception: that it appears that Mrs. Ciocchi, by her agents, was endeavouring to find proofs to support charges of adultery against her husband. All I know is from the correspondence; whence it may be collected that Mr. Ciocchi, in conformity with his declarations, did not endeavour to enforce co-habitation, and from the same source I form the conclusion that Mrs. Ciocchi had no knowledge of the special act of cruelty now charged, for such knowledge would be wholly inconsistent with her letters.

With respect to the charge of general cruelty and ill-treatment, I am of opinion that it wholly fails, and that the evidence brought to support it is so entirely insufficient, that it would be a waste of time to discuss it, and more especially because that evidence has no bearing on the specific act of cruelty charged in the libel.

I now address my attention to the 6th article of the libel, to the facts pleaded therein, and to the evidence adduced to substantiate the charges therein contained. The 6th article charges, that Mr. Ciocchi before, at, and after his marriage was suffering from the venereal disease; that he was attended by divers medical persons; that he was warned against the risk of communicating the disease if he then married; that he did marry, and did communicate the disease to his wife.

If these averments are proved, I should, both on principle and authority, entertain no doubt in deciding that an act of legal cruelty had been committed. The proof necessary to establish such charges is twofold: evidence that Mr. Ciocchi himself had the disease, and evidence that his wife was also affected thereby.

Mr. Watson is the first witness to whose testimony I shall advert; and I see not the slightest reason why I should not

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against
Ciocchi.

Judgment.

Disparity of
years and cir-
cumstances.Separation,
March 14th,
1851.Charge of
general cruelty
not supported.Charge of
knowingly
communicating
the venereal
disease.If proved,
would un-
doubtedly be
legal cruelty.Evidence
proves that
immediately

1853.

Ciocci
against
Ciocci.*Judgment.*

before marriage the husband was suffering from the disease;

give the fullest credit to his testimony. This gentleman had been acquainted with Ciocci for three or four years prior to November, 1850. On the 17th of this month Mr. Watson, who practised as a surgeon at Brighton, attended Ciocci, and found him suffering from the venereal disease, and so continued to attend him till the 27th December, when he was not cured, and when Mr. Watson left him in charge of Dr. Starr, who succeeded to his practice.

Dr. Starr states that Mr. Watson left Brighton towards the end of December, 1850, and was absent the greater part of January; that he succeeded to his practice, called upon Ciocci as a patient, and saw him. On the 10th of January Ciocci told Dr. Starr that he had consulted a foreign gentleman, whose medicines had been of service to him. An inspection then took place, and Dr. Starr swears that Ciocci then had a venereal sore which had been a bad syphilitic chancre, but was then in a healing state. Dr. Starr further deposes, in answer to the 63rd interrogatory, that it appears from Mr. Watson's books, that the medicines furnished were mercurial pills, sarsaparilla, and nitric acid. Dr. Starr did not prescribe himself.

To this evidence there is nothing whatever opposed; there is no contradictory, — no conflicting testimony. I have no right, either legally or morally, to doubt either the veracity or the medical knowledge of these gentlemen. It is therefore proved beyond all question, that Ciocci had the venereal disease for some time immediately prior to the marriage, and that it was in a healing state, but not healed, on the 10th of January.

and that, though warned, he married, and ran the risk of communicating it to his wife.

The next question is, whether he communicated this disease to Mrs. Ciocci. I hardly think it necessary to inquire whether there is evidence of his having been warned of the danger if he married in the state in which he is clearly proved to have been; for I am of opinion that common sense, ordinary experience (I speak not of higher motives), must have suggested to him the probable consequences, — the consequences likely to result in the ordinary course of things, from marriage under the circumstances proved to have existed; and if this were a point necessary to be determined, I should hold, and without doubt, that if a man married under such circumstances, and communicated to his wife the venereal disease, it was, to use the mildest term applicable to such conduct, such utter recklessness of the health and comfort of his wife, that if he did communicate such disease, he was guilty of cruelty in the eye of the law; and I should hold this upon the principle that whoever does an act likely to produce injury, and the injury fol-

lows, can never excuse himself by saying, that he hoped a probable consequence might, by some peculiar good fortune, not follow.

But if warning was necessary, warning he had, and ample warning, too, from Mr. Watson; who told him that it was impossible for him to marry until he was quite cured,—impossible for him to marry in the state in which he was. This was his state on the 27th of December. What his state was on the 10th of January, five days before the marriage, I learn from Dr. Starr.

It would be a mockery of all that is decent, honest, or honourable, to say, that Mr. Ciocci was then in a state to consummate marriage. I will not debase the office I hold by weighing degrees of risk; to marry and consummate a marriage with the slightest chance of communicating such a disease, was a crime and a sin.

But to revert to the question: Was the disease so communicated to the wife? Let me again refer to Mr. Watson. He says, “I was still in Brighton in February, 1851. He told me he was married, and wished me to prescribe for his wife. I did not know her; I never saw her. When I called on the 17th of February, at his house in Clarence Square, she refused to see me. I prescribed for her from his description of her ailment.”

Before I comment on the evidence bearing upon this point, I must express my surprise and deep regret that the examiner has left the evidence on this article in the doubtful state in which I find it. Surely it was his duty to have asked what was Ciocci's description of his wife's ailment, for he has taken down that description there was. Surely he should have asked for what disease Mr. Watson prescribed; what his prescription was. Had this been done, the case would have been comparatively, if not entirely, clear, one way or the other. This most unfortunate omission has left this most material part of the evidence in doubt from which it will not be easy to extricate it.

Before I express my opinion as to the effect of this evidence, I will consider Mr. Seabrook's.

Mr. Seabrook was the medical attendant of Mrs. Ciocci both before and after marriage. On the 17th of February he attended upon her. She was suffering from inflammation of her legs, and generally out of health. He prescribed for such inflammation, and about the second week in March, she recovered. During the early part of his attendance, she mentioned having a discharge from the parts of generation, which he attributed to natural causes. On interrogatory, he says,

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Ciocci
against
Ciocci.
Judgment.

But partly from the fault of the examiner, the evidence does not prove that he did communicate it, or the contrary.

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Ciocci
against
Ciocci.

Judgment.

Strong presumption of the communication of the disease rebutted.

“ That this discharge lasted about two weeks, and then ceased, as Mrs. Ciocci stated. He never attended her for the venereal disease; she never complained of it. His prescriptions were for a different disorder.”

The question is, what conclusion the Court ought to draw from the evidence of these medical persons considered together. 1st. I am of opinion that it being clearly proved, that Mr. Ciocci was suffering under the venereal disease, and so late as January the 10th, and the marriage taking place January the 13th, the probability is, that he communicated it to his wife. 2ndly. I think this probability strengthened by the fact of Mr. Ciocci consulting Mr. Watson as to the health of his wife; not as to her having the venereal disease; that is not so. 3rdly. Further evidence is furnished by the fact of the discharge spoken to by Mr. Seabrook.

But against these presumptions, strong as they are, there is evidence which weighs in a contrary direction, and the absence of evidence of still greater importance. The fact of Mrs. Ciocci having another disorder, and being attended by Mr. Seabrook, to whom no disclosure was made; but above all other circumstances, the fact that Mrs. Ciocci recovered from the symptoms, whatever they were, without any medicine for the venereal disease, as far as appears by the evidence, must have considerable weight. If she had taken that infection, I apprehend that she would not be relieved from its effects without medicine adapted to the cure of that disease. Mr. Seabrook gave her none. What Mr. Watson prescribed, the examiner has, most unfortunately, I repeat, left in the dark. Moreover, I do not find in Mrs. Ciocci's answers (and the fact might have been stated in answer to the 2nd article) nor elsewhere, when she discovered that she had such disease, nor how she was cured.

Strong as the probabilities may be, I cannot presume the affirmative; and this being so, I am compelled to come to the conclusion that it is not proved by affirmative evidence that Mrs. Ciocci was infected with the venereal disease.

I think, therefore, that the charge of cruelty fails; for I am of opinion that it is essential, to support that charge, that the *corpus delicti* should be proved, and here there is not adequate proof. And if there be not adequate proof of the fact, however great the moral delinquency of consummating a marriage with the probable chance of communicating the venereal infection, I am not prepared to say that so doing constitutes legally an act of cruelty as understood in these Courts. In order to constitute an act of legal cruelty there must be, in my opinion, an actual communication of the disease, and the running the risk is not

In order to constitute cruelty, there must be, not merely the risk, but actual communication, which not being proved, the charge of cruelty is not sustained.

sufficient. (a) I must therefore pronounce that the charge of cruelty is not sustained.

Before I address my attention to the evidence adduced to support the charge of adultery, I must notice that there is an extraordinary gap in the history of this case accounted for neither in plea nor evidence, at least with any accuracy.

I presume that this lady continued to live somewhere apart from her husband from March, 1851; that he came to reside in London, and follow his occupation as a teacher of the Italian language (this I am left to presume, as it is nowhere distinctly stated); and that some intimation having in some way reached Mrs. Ciocci or her friends, the inquiry was instituted, which appears by the evidence of Edser and others.

This has led to the employment of policemen, of persons also who had been in the police, and to the examination as witnesses of common women of the town. Whenever persons of this description, such as Owen and others, are employed for money to procure evidence to establish any fact, all that they do or say must be watched with great vigilance, and for divers reasons; such persons are naturally anxious to attain their object, and generally to a certain extent their pecuniary reward depends, or is by them supposed to depend, on their success; and the very nature of their employment,—the constant mixing with the lowest characters,—does not tend to make them the most scrupulous agents. Great care and caution, therefore, is necessary; but such caution must not be carried to an extravagant length, for we all know that upon evidence so procured the lives of many men formerly depended, and even at this day all but life does frequently depend. Somewhat similar observations apply to the other class of witnesses,—the *testes lupinares*, as we are in the habit of calling them, especially when they are accomplices; but if voluntary association with such persons

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Judgment.

Extraordinary
gap in the his-
tory of the
case.Employment
of policemen
and others to
procure evi-
dence. The
testimony of
such persons
must be re-
ceived with
great caution.

(a) Mrs. Ciocci's counsel argued strongly that the risk would be cruelty without actual communication of the disease, and cited *Popkin v. Popkin*, 1 Hag. 765. n. In that case it was pleaded as an act of cruelty "that the husband, when infected with the venereal disease, attempted to sleep in the same bed with his wife, and that on her refusal he became violently enraged, made use of many outrageous and dreadful menaces to compel her; and, on one occasion, seized her in his arms, and forcibly dragged her along towards his bed." In his judgment Lord Stowell said, "Here cruelty is carried down to the latest period of the

cohabitation, the husband forcing his wife to his bed, when he was violently affected with venereal disease. It is not necessary, when there is an attempt at violence by an overt act, to wait till it is actually put into execution. Here he attempted to draw her to his bed when infected with venereal disease; an injury of a most malignant kind, and attempted in the most improper and violent manner."

The circumstances of the two cases being so different, especially *quoad* the knowledge of the wife, the present decision does not appear in any respect to impeach that in *Popkin v. Popkin*.

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If on the balance of evidence there exist any reasonable doubt, it must be given in favour of innocence and against guilt.

Some interrogatories in the case extraordinary and quite irrelevant.

should be proved or admitted, such objection will come with an ill grace, and will be entitled to much less weight if urged by a person so circumstanced.

From all the circumstances, from the probabilities, from the conduct generally of Mr. Ciocci, from corroboration, if any, the Court must form the best judgment it can, remembering always that if there be reasonable doubt, the balance should preponderate in favour of innocence, and against guilt.

I cannot pass over altogether in silence the extraordinary nature of some of the interrogatories addressed to the witnesses on the libel. Amongst other parts of the 8th and 9th interrogatories the witnesses are asked, "Whether Mr. Ciocci is not a member of the Church of England." What that has to do with the question to be decided in this case I am at a loss to conceive. It cannot, I trust, for an instant be supposed that the same measure of justice will not be meted out to all parties litigating in a court of justice, whatever may be their religious persuasions, nor that any party will derive any advantage, because either from education originally, or from adoption, he professed one faith or another. No impression could possibly be made upon the mind of the Court by such an interrogatory.

Then there is an interrogatory as to the religious faith of Mrs. Ciocci, and whether some Roman Catholic Priest or Cardinal has not been in communication with her, and that generally, without any reference to this suit. I cannot conceive what is the legitimate drift (a) of these interrogatories; but be the drift what it may, there is not the least evidence touching this cause produced by them. I shall have occasion hereafter to comment upon some of the other interrogatories, and will now only observe that for all useful purposes I think they might have been greatly reduced in number.

Charge of solicitation of chastity not supported by credible evidence.

But to return to the evidence. Following the order of the libel, the 9th and 10th article pleads what I will, though perhaps incorrectly, term the solicitation of chastity of Jane Legg. I am of opinion that the evidence of Jane Legg alone, unsupported by other testimony cannot be safely relied on to establish the charges; but to prevent misapprehension I will observe that it is possible that such evidence may have more bearing upon other parts of the cause, though not sufficient to establish the charge here made. I do not say that it will have such bearing, but that it may.

Charge of adultery with Charlotte Thomas.

The next case which presents itself for consideration is that of Charlotte Thomas. This case is most materially distinguished

(a) Reference to the rejected passages in the libel will explain the reciprocal insinuations. *Vide* p. 122.

from that of Jane Legg; for the acquaintance, and I may say intimacy, with Charlotte Thomas is not only not denied, but admitted; and the sole question is, whether that acquaintance was of a criminal or innocent nature.

The explanation offered by Ciocci is to the following effect, as appears from the interrogatories addressed to Charlotte Thomas, from the 42nd to the 49th inclusive: That he, Ciocci, was connected with a society called the Female Aid Society, in Red Lion Square; that from pure and laudable motives he induced her to return to her mother, then living at Chelsea, and it must be inferred from the interrogatory, though not so stated therein, that she was a prostitute at the time; and further, that Ciocci's conduct was free from all improper motives, and was, to use the words of the interrogatory, paternal. Some of these circumstances, though not as relates specially to Charlotte Thomas, are afterwards put in plea.

This being so, the questions will be, 1st. Is there a *prima facie* case of adultery with Charlotte Thomas established? 2nd. Is that case rebutted by proof that the acquaintance was guiltless, and the conduct of Ciocci free from blame?

The 16th article of the libel charges adultery with a prostitute not named, during the few months preceding the date of the libel, viz., 19th February, 1853, at Ciocci's lodgings, No. 16. Grosvenor Street West. It is clear from the exhibits, as well as from the interrogatories, that Ciocci's legal advisers were aware that Charlotte Thomas was to be examined.

On the 16th article, Owen deposes, that towards the end of the time he was employed, which would be December, 1852, he saw Charlotte Thomas at the window of Ciocci's lodgings, the second floor of No. 16. Grosvenor Street West.

Charlotte Thomas gives her account of her intercourse with Ciocci; at the commencement of which she was about seventeen years of age. It began at a dining house in Lisle Street, which appears to have been frequented by Italians and prostitutes. It was said in the course of the argument that Ciocci was driven by the want of pecuniary means to resort to such places. I cannot say that argument was convincing to my mind, for I do not believe that frugal accommodation cannot be procured in this metropolis without the contamination of such associations. I do not look with a very favourable eye upon these symposiums of Italian refugees and prostitutes. However, I make these observations to show that the argument did not escape me.

But to proceed with Charlotte Thomas's evidence. She did not see him afterwards for some time, but on returning to lodge in Lisle Street (about November, 1852,) she met him in the

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Husband's
explanation of
his acquaint-
ance with her.Questions: 1st.
Is there a
prima facie
case of adul-
tery? 2nd.
Is that case
rebutted by
proof that the
intercourse
was innocent?Evidence on
the charges.

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Ciocci

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Is Charlotte
Thomas cre-
dible or not?
There is a di-
rect discre-
pancy between
the evidence
which she gave
on different
days of ex-
amination.

street, and went to his lodgings, in Grosvenor Street West, several times, and, according to her statement, committed adultery with him.

This at once raises the question whether she is credible or not: the issue at once becomes, "Is Charlotte Thomas speaking true or false?"

First, let me consider what she states on cross-examination. In answer to the 42nd interrogatory, she negatives all knowledge of the society. She says, "I do not know anything of any such society as the interrogate 'Female Aid Society.' I am not aware that the ministrant ever acted for any such society. I am not aware that he has been the means of restoring any females of a certain class to a moral course of life." Therefore we must conclude from this, that Ciocci did not make the communication to her.

In answer to the 43rd interrogatory, she makes a statement which requires great consideration; she says, "The ministrant's acquaintance with me did commence by his asking me (after some inquiries about my history and circumstances) whether I would not consent to go home to my mother's, if, at his intercession, she would consent to receive me. I did say that I would consider of it; and, upon seeing him a day or two afterwards, say to him that I would be glad to go home. He did then immediately accompany me to my mother, who then lived at Chelsea, and induce her to receive me into her house. He has been a kind friend to me, and taken a great interest in my welfare. He could not have done more than he has done for me, if he had been my father."

Now, to be sure such evidence coming from the mouth of a witness produced by Mrs. Ciocci to prove adultery, is not only exculpation, but high commendation, and I must say it is somewhat startling. Here is a female examined upon the 19th and the 21st of April, and she is brought up on the 22nd for cross-examination. She then makes a statement altogether inconsistent with her previous deposition; I have no means whatever of ascertaining how this was effected, but there can be no doubt that something had taken place during the intervening time. It is impossible for me to say which is the truth, but I do say that by some means or other the witness was induced to make a different statement; and I think it probable that if the examination had not been interrupted, such an answer as that to the 43rd interrogatory would never have been given. If I am to believe that evidence, the conduct of Mr. Ciocci, with respect to Charlotte Thomas, was highly praiseworthy.

It is, however, a little strange, that in the very next breath,

this witness refuses to answer whether Mr. Ciocci had had a criminal connection with her or not. She says, "I refuse to answer upon oath the question, whether he has ever had sexual intercourse with me, or taken indecent liberties with me. He certainly has behaved most gentlemanly and paternally towards me. I am sorry for having told the examiner what I did when I was with him the first day to be examined in chief." One would have supposed that there could have been no difficulty in answering this question, when the answer to the preceding part of the interrogatory is borne in mind, and the paternal conduct of Ciocci so distinctly averred. I must follow up this evidence a little farther.

In answer to the 47th interrogatory, the witness admits an interview with Mr. Adamson, the solicitor, in consequence of a letter (which has not been produced) addressed to her, stating that she was to go there. The date of this interview was the 10th of February, at which time the suit had been commenced, though the libel was not given in until the 19th. She further admits that she then declared that Ciocci was totally innocent, and had restored her to her mother; and she admits paper A. (a) to have been a statement made by her, and signed by her. Paper A. is to this effect:—

"10th February, 1853. I, Charlotte Thomas, declare, that I first saw Signor Ciocci, with three or four other gentlemen, at the Restaurant, in Lisle Street, Leicester Square. I was then in company with a Mr. Matthew, an Italian. I did not speak to Signor Ciocci on this occasion, but I afterwards saw him, when going into the Restaurant alone; he was coming down stairs; we had some little conversation together, when he asked me if I would like to go home to my mother's, if he interceded with her on my behalf. I said I would consider of it, and let him know: I saw him a day or two afterwards, and told him I should be glad to go home, and he immediately accompanied me to my mother's, at Chelsea; and when my mother removed to Sydenham, I accompanied her thither, and it being so very dull, I determined to come again to London. At this time, my sister, now living with ———, was in service at Sloane Street, where she remained altogether about three months, when she left her situation, and came to live with me at 35. Lisle Street, since which time my sister has assisted me in the business of a dressmaker; but I solemnly declare that not the least impropriety of conduct whatever has ever taken place between myself

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and Signor Ciocci; my first meeting with Signor Ciocci was about nine months ago, and I voluntary, and without the least expectation of any reward for so doing, make this statement, that Signor Ciocci has occasionally given me small sums of money, but out of pure kindness, and most certainly not for any improper purpose.

"CHARLOTTE THOMAS."

Now, singular enough, the witness is not asked whether that statement was true or not,—a question which would have been most important to this cause, and most pertinent to the issue; but she is only asked whether or not it was her signature.

This statement marked A., does not and cannot contain the words spoken by the witness, though it may be, that she stated the substance. It was procured, I do not say unduly, for the purpose of discrediting this girl, should she be produced as a witness for Mrs. Ciocci.

Her evidence must be handled with great circumspection.

Looking at all these circumstances, it is very manifest that the evidence of this witness must be handled with much circumspection. The object of Mr. Ciocci must be to show that she is not deserving of credit; it must be, not to set her up, but to set her down. Her evidence in chief, as to adultery, is not contradicted directly by her evidence on interrogatory, but it is contradicted by her statement to Mr. Adamson, and so far her testimony is impeached. It will not, however, necessarily follow that her evidence is to be wholly rejected on this ground; for I take it to have been decided that a witness may, under certain circumstances, be believed in part and discredited in part; that it is not necessary to reject her *in toto*.

Evidence of a doubtful witness may be received in part and rejected in part.

No interrogatories put to the witness respecting her numerous visits to Ciocci's residence.

It is somewhat singular, however, that looking at the 16th article of the libel, no interrogatories were put as to the visits in Grosvenor Street West; for such numerous visits, if deposed to, were not very consistent with the defence set up. I think, too, the Court was entitled to some information how this paper A. was procured. That matter might have been cleared up by the attorney or his clerk. I shall have to comment, in another part of this case, upon parties obtaining statements from witnesses; and although I do not say that this should not be done, yet I do think that the Court should be fully informed how it happens, and of all the circumstances under which such paper was obtained.

The gist of Ciocci's defence respecting this girl has not been pleaded, nor proved, as it

There is one other omission, which I think particularly deserving of notice. The gist of Mr. Ciocci's defence to this charge is, not to deny his acquaintance with this girl, but to admit it, and to claim credit for having restored her to her mother. How comes it that this defence was not pleaded, and

the mother examined? The mother came up with the daughter when she was examined. Surely, any intercourse between a married man, separated from his wife, and a prostitute of this description, does require the best explanation which can be given.

I regret to say, that I am left wholly without evidence as to anything which may have occurred between the examination and the cross-examination of Charlotte Thomas. But when I look at the inconsistency of her evidence given upon interrogatory with that given in her examination in chief, I cannot but entertain a grave suspicion that this witness had, in the meantime, been tampered with. This suspicion is confirmed on reference to the interrogatories administered to the witnesses examined on the libel. The first interrogatory is in these words: "Let each witness designed hereto be asked, On your oath, have you not seen one or more of your fellow-witnesses since the completion of his or their examination? If you admit that you have, which have you seen? Has such witness made no disclosures whatever to you as to the tenor of his, her, or their deposition in chief, or of the interrogatories administered to them, or of his, her, or their answers thereto? If any witness has made any such disclosures, say whom, by name? On your solemn oath, are you wholly unapprised of the tenor of the interrogatories which you may suppose are about to be administered to you? If on any, what have you been apprised, and by whom, in respect thereto.

Now, this interrogatory was not administered to this witness. The first administered to her was the third, and not the first. From this, it is as clear as daylight that the witness had been tampered with, and that this interrogatory was not administered to her lest it should become known to the Court by whom she had been so tampered with. I wish, indeed, I could by any means discover by whom it had been done; he should answer, if not here, most assuredly before another tribunal, for such proceedings. It has been a shameful attempt to deceive the Court, and to prevent its arriving at the truth by a suppression of this interrogatory.

I have now, at some length, discussed the evidence on this 16th article. Before I come to any conclusion I shall go through the rest of this case, and for this reason, that as the defence turns so mainly on the character of Mr. Ciocci, on his being actuated by pure and benevolent motives in his intercourse with this and other girls, I wish to ascertain, as far as I am able, what is the effect of the evidence with respect to Mr. Ciocci's conduct and motives with regard to women of this

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against
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been, if true,
by her mother.Inconsistency
of the girl's
evidence, and
the omission of
certain interro-
gatories, leads
to the conclu-
sion that this
witness has
been disgrace-
fully tampered
with.Before coming
to any conclu-
sion upon this
branch of the
case, it is de-
sirable to con-
sider the evi-
dence upon
the other parts.

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The charges
of adultery
with Polly
Miller are not
supported by
sufficiently
credible evi-
dence.

description. I postpone, therefore, for the present, pronouncing any opinion on this charge.

With regard to the charge of adultery, at a brothel at Brighton, with a woman named Polly Miller, it is supported by the evidence of Juliana Bech alone. Whether she is mistaken as to the identity of Mr. Ciocci or not, I need not stop to inquire, for I could not safely proceed to any conclusion adverse to Mr. Ciocci on her evidence alone, unless corroborated by further testimony.

The additional articles charge adultery with Polly Miller, in Market Street, in February or March, 1853, but of this, also, there is no evidence save that of Mary Ann Hadley, and she is a common prostitute. The interrogatories do, indeed, show that Polly Miller must have been in communication with Mr. Ciocci's legal advisers; but this circumstance alone is not a sufficient corroboration, though it shows that Hadley is correct in the account she gives of herself and Polly Miller. It would not, I think, be safe or consistent with justice to found any conclusion adverse to Mr. Ciocci on this evidence. All I say is, that it is not sufficient alone.

The charge of
habitually con-
sorting with
prostitutes is
not denied,
but admitted
and explained.

Before proceeding to the case of Fanny Alexander, I shall very briefly notice the 8th article, and the evidence thereon. The 8th article pleads the habitual consorting with prostitutes, and constantly walking with them, both in Brighton and London.

Owen's evidence is to the following effect: — That he commenced watching Ciocci on the 6th of October, 1852, and continued to do so up to the 3rd of December. During this period he saw Ciocci conversing with prostitutes no less than seven times, both in the morning and in the evening. There can be no reason to doubt the general correctness of this evidence, because the conversing with prostitutes is a part of Mr. Ciocci's own case. It is his case in plea; it is his case in interrogatory.

I do not here stop to inquire whether the mode of consorting with prostitutes, spoken to by Owen, is consistent with the motives to which Mr. Ciocci makes claim. I reserve that consideration till I have discussed the evidence on Mr. Ciocci's allegation. The fact of so consorting is proved and admitted; whether explained satisfactorily or not, I must determine. The *onus probandi* is upon Mr. Ciocci.

The *onus pro-
bandi* lies upon
Mr. Ciocci
with respect to
this explana-
tion.

Charge of
adultery with
Fanny
Alexander.

I am thankful to say I have reached the last case, namely, the charge of adultery with Fanny Alexander. But as the discussion of this portion of the case occupied by far the greater part of the time of counsel in the argument, so I fear it will be.

necessary for the Court to enter with considerable minuteness into its examination.

This charge is contained in three articles, the 13th, 14th, and 15th, and Fanny Alexander has herself been examined. She is, according to her own account, a prostitute, and aged about twenty. On the 13th article she deposes to her first criminal connection with Ciocci, somewhere about May, 1852, at a brothel in Chelsea, which she knows not to describe, nor even the street in which it is situate. On the 14th, that she frequently met Ciocci in Windsor Terrace, Vauxhall Road, and that he offered to take improper liberties with her. On the 15th the great controversy has arisen. The time to which the witness is speaking will otherwise appear; from her evidence it would be in the summer or autumn of 1852. It was in the beginning of November.

She states that Mr. Ciocci was ignorant of her residence in Westminster; she asked him to direct to her at 7. Stafford Place, Pimlico; she received a note desiring her to call upon him at No. 16. Grosvenor Street West; she went, and afterwards accompanied him to the police-office in Cottage Row; then to Rochester Row; he told her to deny ever having had connection with him; then they went to No. 15. Shaftesbury Crescent, then back to Grosvenor Street, and there he had connection with her.

This being the substance of her evidence in chief, let me next consider what she has said upon interrogatory.

It is a fact in the case, that the solicitor for Mrs. Ciocci employed Mr. Edser, a builder at Vauxhall, and a friend of his, to use means to obtain evidence in support of the charges against Mr. Ciocci; that through Mr. Edser's means various persons were so employed, as Owen, Russell, and others.

Now, the 17th interrogatory inquires whether the witness (Alexander) knows anything of these persons, and amongst others of Guadaleta; and then the witness states that he had slept with her one night. This fact must be borne in mind in the examination of the subsequent evidence.

The answer to the 21st interrogatory, which relates to the Red Lion Square Society, is a negative, save that she says that Mr. Ciocci asked her if she would like to change her mode of life, telling her that if she would be a good girl, he would get her a situation. It is no easy matter to sift the evidence where there are parts which are true and parts which are not; and it is difficult to discover what parts are supported by the evidence; but I must not shrink from the task.

The 22nd interrogatory runs thus, "On your oath, is it not

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the fact that the ministrant afterwards, having seen you in company with an Italian named Guadaleta, did speak to you concerning the said Guadaleta, and ask you what you knew of him, and make an appointment with you to go to his house, in order to receiving a statement of what you knew in respect to the said Guadaleta?" Let us pause a little to consider what the witness is called upon to answer, and what she has answered. She is interrogated in the words I have read. It seems intended to ask her whether the seeing her with Guadaleta, and the appointment to come to Grosvenor Street, were not almost contemporaneous; but what are the facts of the case,—what are the dates? Why, the Guadaleta business was, according to Ciocci's own case, on the 4th of August, and the appointment was not made until the 2nd of November.

Now, I must say, that the interrogatory, as put, appears to me calculated to lead to confusion, to say nothing else of it. But what is her answer to it. "On my oath, it is not the fact that the ministrant afterwards, having seen me with an Italian named Guadaleta, spoke to me concerning the said Guadaleta, and made an appointment with me to go to his house in order to receiving a statement of what I knew in respect to the said Guadaleta." It is quite clear that both the examiner and the witness understood the interrogatory as I understand it, viz., that the appointment was immediately subsequent to the girl's having been seen in company with Guadaleta. The answer to the 23rd interrogatory is important: the witness admits seeing Patriarchi in Grosvenor Street on the 3rd November, but she denies that the object related to Guadaleta; denies any statement in writing by Patriarchi; admits going to Cadogan Place; denies that Ciocci left her at the corner of Windsor Terrace, and went on alone in the cab.

When a witness has been taken charge of and kept in the custody of a party in the cause, the Court will exercise the greatest vigilance in the examination of her evidence.

Now this witness having admitted, in her answer to the 23rd interrogatory, that she had been staying at the house of Miss Jones, at Boxmoor, whither she had been sent by Mr. Edser and Owen, the Court is bound to exercise the greatest vigilance in the examination of her evidence; for although circumstances may sometimes render it necessary or advisable thus to take charge of witnesses, yet it must necessarily attach to their evidence a degree of suspicion.

But whatever may be the value of her evidence, the question mainly put in issue by her answer to the 23rd interrogatory is, whether she did or did not, after leaving No. 15. Shaftesbury Terrace, go with Ciocci to his lodgings in Grosvenor Street West.

The affirmative is sworn by Alexander, Edser, Owen, and

Horsey. The question I am now to try is the mere fact; the inference therefrom must, of course, be considered hereafter.

Mr. Ciocci has counterpleaded this 15th article of the libel, in the 5th article of his allegation. The 4th article of the allegation counterpleads the 13th of the libel, but on this article no witness has been examined. The 5th article pleads, &c. (a)

So that *three* times, in July, in August, and in November, Ciocci accidentally meets this girl, *accidentally* as pleaded, yet not *inopportunately*; for the second time Ciocci obtains proof against Guadaleta, whose appointment he was opposing; and the third time he has the good fortune to find her when he wanted her to make oath against Guadaleta, and perhaps, also, for another purpose, to exculpate himself.

These matters require close sifting. 1st. How does this statement as to the early meetings agree with the evidence of Fanny Alexander? Other evidence there is none. Her evidence does not at all agree with the plea of Ciocci's allegation, except that there was a meeting in July, 1852, in the Vauxhall Road. The precise time is of no importance, but as to the result of the meeting there is a total difference. I cannot collect from the plea that there was any other meeting than those in July, August, and November; but Fanny Alexander deposes to several. On the 17th and 22nd interrogatories, this witness gives an account of her connection with Guadaleta; but it differs wholly from Ciocci's plea, for she states that Guadaleta was walking with Ciocci, when Guadaleta quitted him and joined her: Ciocci's account is, that he accidentally saw them together, and recognised her. He states that this took place in August, early in the month. And so, according to Ciocci's statement, the matter sleeps till October, when he mentions it to Mr. Glennie, according to his own account.

Mr. Glennie says, Ciocci was opposed to the selection of Guadaleta as minister (this would be prior to August), but with reference more to his incapacity. Unfortunately, Mr. Glennie cannot say at what time—August, September, or October—the communication of Guadaleta's alleged incontinence was made; so that I must take Ciocci's own account, that he did not make this communication for two months.

Mr. Burgess deposes to the charge against Guadaleta made by Ciocci in October, 1852. Mr. Burgess did not desire him to ascertain the nature of the charge; Ciocci proposed to substantiate it. Mr. Burgess does not support the plea as laid, but this does not appear to me of importance. It matters little whether he asked Ciocci to prove the charge, or whether, after

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what passed, Ciocci volunteered to do so. Ciocci afterwards sent in a document, but not No. 10. (a), which was never seen by Mr. Burgess or Mr. Glennie. All this with Mr. Burgess occurred the end of October or the beginning of November.

Now comes the question, how the meeting of November 3. took place—of no importance, indeed, in itself, but as relating to the credit due to Mr. Ciocci's statement, and the credit due to the witnesses, of very great moment.

I must begin with the 2nd of November. According to Patriarchi's account, on the 2nd of November he and Ciocci went in search of Fanny Alexander. Where they went this witness does not say; nor at what time, day or night—I mean, in his examination in chief; but inquiries were made of a policeman, who has not, however, been examined in the cause. They met the object of their search, and Ciocci gave her an envelope with his address, and made an appointment for the next morning. On cross-examination Patriarchi states that the meeting with Alexander was in the evening, and somewhere about Eaton Square.

As the policeman is not examined, all this stands on the evidence of Patriarchi alone, save as hereinafter excepted. The 76th interrogatory is in these words: "Did you not, in or about the month of October or November last, and when particularly, see the ministrant speak to a police constable in or near Stafford Place South? Did he not give to such policeman his card? After the ministrant had left the policeman, did you not ask of him, the policeman, what the gentleman, meaning the ministrant, wanted? Did he not then inform you that the ministrant wanted him to make inquiries about a female who had given her address 7. Stafford Place South, and that he, the ministrant, wanted such female as a witness?" Now, it clearly appears from this interrogatory, and incidentally from Owen's answer to it, that Alexander had given to Ciocci her address as at 7. Stafford Place South; and further, that Ciocci had given the policeman his card. It is clear, therefore, both from the interrogatory and the answer, that before the evening of the 2nd of November, Ciocci was aware that Alexander had given her address as in Stafford Place; not one word of which is to be found in Patriarchi's evidence in chief. He is entirely silent as to any address being known, and his answer to the 7th interrogatory is to the same effect.

Two things, then, are clear: that Ciocci knew of the address and spoke to the policeman, and gave him his card; but whether Ciocci and Patriarchi met Alexander accidentally that same

evening, and whether he wrote her a note, are different questions.

The next task is to examine the evidence on the other side. On the 15th article Sarah French says, "I knew Alexander from August to Christmas, 1852. She once asked me to allow a letter to be taken in for her at the house where I then lodged, No. 7. Stafford Place, South. I consented, believing I should be doing her a service by so doing. I cannot at all speak to the date of this; it may have been about the middle of the time during which I was in the habit of meeting her. Very soon after I had consented to the letter being taken in, a foreign gentleman, whom I believe to have been Mr. Ciocci, called at the said house; it was on a Sunday evening that he did so. I saw him; he asked for the girl Alexander. I told him she did not live there; but if he wrote a letter to her, that she would have the letter, and he then went away; and early in the same week, I think it was on the Tuesday or the Wednesday, a letter came to the house, addressed to Alexander. It came there by the public post. I did not take it in, but I got it, and took it to Alexander. I gave it to her the same evening; we read it just at the corner of Eccleston Square; we both read it under a gas-lamp. The letter was a letter from Ciocci to Alexander; to the best of my recollection its contents were to appoint Alexander to go on the following morning to Ciocci's lodgings, 16. Grosvenor Street, West; and it told her to come neatly dressed, and to dress herself as like a maid servant as possible. It also added, that if she would not come, she was to write to Ciocci to tell him so; and it enclosed an envelope directed to Mr. Ciocci, 16. Grosvenor Street, West, for her to put a letter into, if necessary to inform him of her not coming. I gave the letter to Alexander, and I believe she put it into her pocket, and took it away with her. I think the letter was directed to Miss Ellen Alexander."

If this evidence be at all consistent with the truth, it is clear that it cannot easily be reconciled with Ciocci's statement of the accidental meeting, or with Patriarchi's evidence. I am well aware that this witness is not a person of character, but of that hereafter.

I will now see how her evidence tallies with that of Alexander. Unfortunately, Alexander's evidence at the commencement of this article is taken down very briefly. The examiner did not, and probably could not, foresee of how much importance detail would have been. As far as it goes, her evidence corroborates that of French, and contradicts that of Patriarchi, and on the 22nd interrogatory in the strongest terms. The

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result is, that Patriarchi, as to the accidental meeting, is confirmed by no one; she is by several, and by the fact that Ciocci did know Alexander's address.

I now resume my examination of Patriarchi's evidence, especially that part which cannot be contradicted save by Alexander. Patriarchi was examined on the 31st of May, 1853. His answer to the 3rd interrogatory, shows his state of knowledge on the 2nd and 3rd of November as to the matters now agitated. He was asked to give evidence as to what happened between Ciocci, himself, and the girl Alexander, in that affair about Guadaleta; he was then ignorant of the charges of cruelty and adultery; Ciocci never spoke to him of them, only that he had been accused of being with the girl Alexander, and he says, "that was *only a few days ago* that he told me this." Consequently it was long after the 2nd of November, 1852. Patriarchi, therefore, proceeds with the knowledge of, and for the purpose of substantiating the charge against Guadaleta, and wholly ignorant, on the 2nd and 3rd of November, of the charges against Ciocci.

Now, with reference to this meeting, between Ciocci, Alexander, and himself, upon the 3rd of November, 1852, he says in his examination in chief, "I put certain questions, all of which I wrote down on paper, and then took down her answers. Those questions were concerning her connection with Guadaleta." He then identifies the paper No. 10., and in answer to the 4th interrogatory he says, "All the questions were written down before Alexander came into the room." Now, making all just allowance for an imperfect knowledge of the English language, there are still some circumstances deserving notice as to this paper. First, was the date, August 4, stated by the witness, or merely a suggestion from Ciocci? In answer to the 5th interrogatory he says, "The girl gave the date of her own accord. I asked her if it was the 4th of August, 1852, and she said 'Yes.'" In other words the date is Ciocci's own, suggested to Patriarchi. In the 9th answer she is made to say that she met Guadaleta twice afterwards; and in the 10th, that he said she was a very bad girl to go and tell his friend everything. But did she do so, and did the meeting with Guadaleta occur according to the evidence furnished by this statement? The 16th question suggests that the girl had seen Ciocci that evening. The plea, however, represents that Ciocci saw accidentally Guadaleta pick up the girl Alexander, and the first question represents Ciocci and Guadaleta as walking together; and must not this be true, if there be any truth in the whole matter? How could the girl tell Ciocci all this if Ciocci's plea

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be true? How did she know that Guadaleta was a friend of Ciocci's, unless she saw them together? How could she make a communication to Ciocci, except she saw him? And not a word of this is said in Ciocci's plea. The plea represents that he saw her three times *accidentally*; not a word more. Then I draw this conclusion, that this paper, No. 10., does not agree with the plea deliberately drawn from Ciocci's instructions; and the fact of that difference is remarkable.

To go on with Patriarchi and the paper No. 10. He deposes that Ciocci took the girl in the cab for the purpose of her being sworn to the answers as to her connection with Guadaleta. Those questions, 17, 18, 19. and 21. all relate to Ciocci. First, then, I ask, what has this to do with the charges against Guadaleta? Patriarchi, according to his own statement, knew nothing of the charge against Ciocci. Next, who suggested those questions, and for what purpose? Patriarchi, as I have said, knew no charge against Ciocci at that time; why volunteer the suggestion? The reason which he gives is most singular; it is in his answer to the 5th interrogatory, as follows: "I put the question No. 21., the last on the exhibit No. 10., of my own accord; my motive was because, if any one should, in a matter of that sort, want to know how Mr. Ciocci got that information, it should not be fancied he got it in an improper way. Mr. Ciocci was present when I put the question. I had not put a question of the same purport to Mr. Ciocci previously. I put it entirely after my own mind. I did not think it possible that he might have had sexual connection with Alexander. I did it to prevent mischief, to prevent Guadaleta doing the same against him. It was intended by such question to ask Alexander if she had ever had sexual connection with Ciocci." This does appear to me a most singular reason for such a question — to prevent Guadaleta saying the same against Ciocci; and I must say that, making all allowance for shrewdness, domestic or foreign, it does appear to me somewhat improbable that at that time Patriarchi should have had the foresight to arm his friend against the possibility of attack, by taking such a deposition.

But, even supposing Patriarchi's account to be true, what is to be derived from this document in support of Ciocci's case? Here is an unfortunate girl brought into the presence of two persons leagued together for objects of their own, to take away the character of one man absent, and to set up the character of one present. And this girl is to be examined on a set of questions already written down, expressly framed to carry out the views of the parties. All this being done, the document itself is kept *in retentis*, — is not proved to be even in existence

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by any one but Patriarchi — is never shown to Mr. Burgess or Mr. Glennie, for whose especial use it was to be procured. I ought also to add, that the answers are so framed as to induce a strong suspicion that, if even written about the time, viz., Nov. 3rd, they were framed by the very persons who wrote the questions. (a) One instance, and that not an immaterial one, that these answers emanated not from the girl herself, is the date. The answer to the 18th question bears strong marks of suggestion, if not of fabrication. I have no hesitation in saying that such a document so procured cannot affect the credit of Alexander, or of any witness: it is a document disgracefully procured, and, if in existence at the time, disgracefully held back. To attempt to discredit a witness by such means as these, is, I believe, unparalleled in any court of justice.

But I will now refer to Alexander's evidence as to what passed on this memorable occasion, when this secret conclave was held in Grosvenor Street West. Alexander in chief is silent as to this matter; the 15th article would not lead to it. On the 21st interrogatory she negatives all knowledge of the Red Lion Square Society; and if this answer be true, what becomes of the answer to the 18th query in paper No. 10.? On the 23rd interrogatory she denies that she went to the house to state what she knew of Guadaleta. She denies that Patriarchi wrote down any statement of her's as to Guadaleta. With respect to the further question, as to where she went with Ciocci, on leaving his house on the 3rd of November, she answers affirmatively, and in accordance with the interrogatory. Patriarchi, however, swears that though she went away with Ciocci, she never returned to Grosvenor Street, nor saw Ciocci again that day, for that he spent the remainder of the day after Ciocci's return, alone with Ciocci.

Now, the issue is simply, Did Alexander return to Ciocci's or not? Who is to be believed? Am I to believe Patriarchi or Edser, Owen, Horsey, and Alexander? West who drove Ciocci is not examined. Here we have four witnesses to one, and three of them not of the description which Alexander is. To whom shall I give credit?

I will again postpone the answer until I have examined a main position in Mr. Ciocci's defence, viz., his connection with

Examination
of evidence as
to Mr. Ciocci's
connection
with the Fe-
male Aid
Society.

(a) It was strongly argued by Mrs. Ciocci's counsel, that Patriarchi's statement respecting the exhibit No. 10., viz., that the questions were all written down before Alexander came, and that her answers were then added to them, was dis-

proved by the appearance of the paper itself; inasmuch as some of the questions were of such a nature that the precise length of the answers could not have been anticipated, and yet in every instance the exact space had been left.

the Red Lion Square Society, his acting as agent for that society, and his consequent intercourse for pure purposes with prostitutes. I must observe, however, by the way, that even the establishment of such connection does not of necessity prove innocence. No one could contend that a support of such societies, however laudable in itself, constituted a panoply of purity. I fear mankind is too prone to error, too liable to inconsistencies, not sometimes to yield to those very temptations, from the effect of which they were anxious to shield others. Still a *bonâ fide* connection with such a society, — a *bonâ fide* and prudent furtherance of its objects, would go a long way to account for conduct otherwise suspicious, if not explained.

I am very anxious to do Mr. Ciocci justice in this matter; it is most important as relates to his character, and may have no slight bearing on the decision of this cause. I shall therefore state the plea, and then the proof.

This important averment is to be found in the 4th article of Ciocci's allegation, which pleads — “ *That Ciocci was, and is a member of a certain society, known as the Female Aid Society, in Red Lion Square; that, from 1850 he had taken, as he still takes, an active part in promoting the objects of that society; that he accosted and conversed with Fanny Alexander; and that he urged and endeavoured only to persuade her to abandon her course of life, and put herself under the protection of the said society;*” and then the article denies adultery. The witness to this part of the article is Mr. Smith, the secretary of that society, who deposes that he had known Ciocci for eight or ten years, since he (Smith) was secretary to the Protestant Association, when Ciocci came to him, he (Ciocci) being about to publish a book under some such title as the *Cruelties of the Inquisition*. He says,—“ So far as voluntary efforts are concerned, he was a member of that society. He has undertaken to distribute tracts in connection with that society. He has not been nor is he a member of that society in any other way than in naming persons from whom I might obtain subscriptions. The tracts which he distributed were addressed to women with a view of inducing them to enter a penitentiary. He frequently called on me to ask me to introduce cases which he might find into the penitentiary. He has from 1848, up to the present time, taken an active part in promoting the objects of that society. I cannot at all depose to any particular case by the names of Fanny or Helen Alexander. He frequently, from 1848 up to the present time, has spoken to me of his endeavours to persuade females of the town to abandon their course of life, and to place them under the protection of the

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society. As to anything which has occurred between him and any female, I cannot of my own knowledge depose, except that from what I know of him I disbelieve that anything improper occurred. His object was purely benevolent."

I do not find it very easy to ascertain with precision the effect which ought to be attributed to this evidence. In answer to the 11th interrogatory, Mr. Smith deposes as follows:—"It is only from his own statements, and from the hearsay of other persons that I know of the producent's exertions in promoting the objects of our society." It is clear that this evidence does not come up to the plea; and the most I can make of it is, that Mr. Ciocci conversed with Mr. Smith as to the objects of the society; that he suggested subscribers; that he undertook to distribute tracts; and, in short, satisfied Mr. Smith that he took an interest in the welfare of the society.

But this matter must be more deeply sifted, so far as I have the materials to enable me so to do. The object for which the connection is pleaded is to account for accosting Alexander in the Vauxhall Road. I should have been glad of further explanation. I know nothing of this society, save from this evidence; but I really doubt whether such societies are so affluent in their resources, and at the same time have such a scarcity of applicants, that it is usual to send out agents into the highways and byeways to bring in persons to receive the benefit of such institutions. However, still this may be so.

Let us see how it works in the case before us. There are two girls so accosted, and so induced to reform,—Charlotte Thomas and Fanny Alexander, and they both retort by charging the pious agent with the commission of adultery. Not one of them comes to the institution, and both of them swear they never heard of it, till under examination. Both admit that Mr. Ciocci spoke of reform. Charlotte Thomas, not in chief, but on interrogatory, deposes that Mr. Ciocci took her back to her mother; this first comes out as I have said on interrogatory; and, under the circumstances which I have already mentioned, it is much less credible on interrogatory, and the mother is not produced to prove it.

I cannot say that these efforts have been so successful, in my judgment, as to afford matter for unmixed congratulation to the society. Another step in this case. Does this evidence of Mr. Smith, and this interest in the society, call for such association with prostitutes, as is described by Owen in his evidence on the 8th article? Was it a part of the vocation for Mr. Ciocci to be drinking with Polly Miller at the corner of Tichbourne Street, and to be constantly accosting prostitutes? I confess

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What is Mr. Ciocci's character as proved by the evidence in this case?

these things do somewhat surprise me, who have so little evidence as to the proceedings of these societies. If I am to believe that the acting as agent of this society removes all suspicions from associations the most suspicious, I am to expect that the agent is "*integer vitæ scelerisque purus*," at least to the ordinary extent of fallible man. Does Mr. Ciocci, by the evidence in this case, appear to be such a character? Can I pronounce him so to be? What facts are there proved in this case beyond all reasonable doubt? That Mr. Ciocci, in December, 1850, and January, 1851, had the venereal disease, derived from association with some of these females; that not being assured of perfect cure on the 10th, he married on the 15th. Is this all? How stands Mr. Ciocci's character for veracity and regard for the solemn obligation of an oath? Is it possible to read the evidence and his answers and avoid coming to one conclusion? I will not waste time with noticing the argument that the salvo to Mr. Ciocci's is contained in the words, the magical words, "as articulate" — which I am sorry to say have served, and, as appears, are likely to serve, again as a cloak for disguising the truth, and for the promulgation of falsehood. I rely on Mr. Ciocci's answers to the 6th article. He denies that he was ever affected with the venereal disease. Mr. Watson and Dr. Starr depose that at the very time of, or immediately before the marriage, he was suffering from such disease. Can I doubt the evidence of these gentlemen? If they have spoken the truth, Ciocci has not. I am bound to look to character, for in this case the defence is character.

Now for the result of this investigation into the alleged connection with the Red Lion Square Society, which is brought forward as the explanation of all Mr. Ciocci's intercourse with women of the town; and is a defence against all the charges. I am of opinion that the defence wholly fails; that the attempt to ascribe to Mr. Ciocci the true and laudable motives which, no doubt, govern the society itself, is not supported by affirmative evidence; and that any presumption arising from the evidence of Mr. Smith is rebutted and annihilated by the proved conduct and character of Mr. Ciocci himself. All honour to those who, from pure and laudable motives, dedicate their money and their time to rescue from vice and misery the outcasts of this world; but nothing can be more disgusting than when an ostensible connection with such society is paraded for selfish motives to conceal corrupt indulgence, and to defeat justice.

I trust that I have with due patience and care examined all the evidence to establish the alleged explanation and justification of Mr. Ciocci's conduct; and I have not forgotten that he is a

The defence, of connection with the Female Aid Society fails.

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foreigner, though, after eight years' residence here, that is an element of little importance. I am of opinion that the explanation and attempted justification wholly fail. And now the question which I have reserved remains for determination, and I seek to find the bearing and effect of this failure on the evidence to prove adultery.

As to Charlotte Thomas: there is her own oath, supported by the evidence of Owen, who saw her in Mr. Ciocci's room. I am of opinion that her evidence in chief is not shaken by her cross-examination, but confirmed; for I deem it to be perfectly clear that, between her examination and cross-examination, she has been tampered with; and as to the supposed restoration to her mother, I am not to be deceived by the mere words of the witness on such a cross-examination, when the best proof, the evidence of the mother, is withheld. Intercourse, though said to be not illicit, is the very foundation of Mr. Ciocci's defence; and as I think the averment of benevolence and philanthropy wholly fails, it follows that such admissions corroborate the evidence to actual guilt.

Similar observations apply, though more strongly, to the case of Alexander. Patriarchi is contradicted by both French and Alexander, as to the arrangement for the meeting of November 3; by Edser, Owen, Horsey, and Alexander as to the return to Grosvenor Street; and, so far from his evidence being confirmed by the exhibit No. 10., it bears in my mind strong suspicion of fabrication. I have no doubt that Alexander did return to Grosvenor Street; and, if that be so, the false defence set up is the strongest corroboration of the truth of her evidence; if there for purposes wholly unexplained, to what other conclusion, according to the dictates of common sense and every day's experience, could a court of justice come.

I pronounce for the separation, on the ground of adultery with Charlotte Thomas and Fanny Alexander, and I condemn Mr. Ciocci in the costs.

Proctor for the wife, *Bathurst*; for the husband, *Lochner*.

Charges of
adultery
proved. Di-
vorce accord-
ingly.

THE HIGH
COURT OF
ADMIRALTY.
Nov. 7.

A vessel
dragging
her anchor,
and coming
into collision
with another,
held to blame
for not having
let go another anchor. Held, also, that this was the fault of the pilot alone, and that the owners were therefore not liable. No costs.

THE "NORTHAMPTON."

THIS was a suit brought by the owners of the "*Feronia*," a schooner of 96 tons burthen, against the "*Northampton*," an American vessel, of the burthen of 982 tons, for damage occasioned by a collision between them off Liverpool, on the 24th of February last.

Held, also, that this was the fault of the pilot alone, and that the owners were therefore not liable. No costs.

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 THE
 "NORTH-
 AMPTON,"
Pleadings.

The act on petition alleged *that* the "Feronia" sailed from Wexford, in Ireland, on the 22nd February, laden with a cargo of oats and flour, bound to Liverpool; *that* on the following day she arrived off the Great Orme's Head, and was there boarded by a duly licensed Liverpool pilot, under whose charge she was brought safely to anchor, it being ebb tide, abreast the landing-stage, opposite the George's Pier Head, at Liverpool, with her best bower anchor and sixty fathoms of chain, at 11:30 P. M., of the said 23rd February, in order to be docked with the flood tide; *that* all sails were then furled, an able seaman stationed as anchor watch, and a lighted patent signal lamp which was visible all around, was placed at the masthead; *that* the wind was blowing fresh from the north, and the night very clear; *that* under these circumstances, about 12:55 A. M. of the following day, as she was lying with her helm a-starboard broad sheer in towards the said landing-stage, the anchor watch observed a large ship coming across from the Cheshire side of the river, dragging her anchor, and immediately reported the same to the pilot; *that* the said pilot and the mate immediately came on deck, and saw the said ship (which proved to be the "Northampton") coming across the river, dragging her anchor, and apparently about to pass under the stern of the "Feronia," and then distant from her about forty yards to the N. W.; *that* they thereupon hailed the said ship first to port her helm, and then to give her more chain, but received no answer; *that* the ship sheered on towards the landing-stage to a position N.E. of the "Feronia"; *that* the mate of the "Feronia" hailed the ship to starboard her helm, in order to keep her on the inside, but still got no answer; *that* two or three minutes afterwards a man came on the forecastle of the said ship, and was then hailed by the mate of the "Feronia" to give his ship more chain; *that* immediately after this hailing the ship broke her sheer, and came into the "Feronia," and did her considerable damage; *that* the ship then dragged the schooner under her bows from the place where she had first brought up, and from which she had never moved until the period of the collision, to the middle of the river, in the direction of Seacombe, and thereupon went clear of her; *that* afterwards, in consequence of being so far out in the force of the tide, the "Feronia" began to drive, whereupon a second anchor was let go, which brought her up, and at 11 o'clock A. M. of the same day she was taken into the King's Dock at Liverpool. *That* the said collision, and the damages consequent thereon, are solely to be attributed to those on board the said ship "Northampton," owing to their want either of a good look-out or of proper skill and seaman-

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ship, and are not in the slightest degree to be attributed to the said schooner "Feronia."

5 Geo. 4. c. 73.

The answer alleged, *that* the "Northampton," on her voyage from New Orleans with a cargo of cotton, arrived on the 23rd February last, off the port of Liverpool, when, to wit, at about 9 A. M., George Rogers, a duly licensed pilot for the port of Liverpool, was taken on board, and employed by the master of the said ship to pilot her into one of the wet docks, within the said port, in accordance with the provisions of an Act of Parliament passed in the fifth year of the reign of King George the Fourth, intituled "An Act for the better Regulation and Encouragement of Pilots for the conducting of Ships and Vessels into and out of the Port of Liverpool;" *that* from such time, and until after the collision in question, the said ship continued to be and remain under the sole charge and direction of the said duly licensed pilot, and *that* during the whole of such time, the orders of the said pilot were obeyed in every respect. *That* the said ship proceeded up the river Mersey, and at about three P. M. of the same day her starboard anchor was, by the pilot's orders, dropped, and she was brought up off the south end of the landing-stage, at about a cable and a half length across the river from the Liverpool side, preparatory to her being taken into docks. (a) *That* it being then ebb tide, and the wind blowing fresh from N. N. E., about seventy fathoms of chain were paid out from the windlass; *that* about half-past five the same evening, the tide began to flow and the "Northampton," swung round with her head to the northward, or down the river, and, under the pilot's orders, a sheer was given her to the westward, by keeping her helm to starboard; *that* she rode securely to her anchors in that position against the united strength of tide and wind; *that* at dusk a bright signal lantern was hung up, and remained burning brightly, and a regular watch of three hands was set; *that* at about half-past eleven P. M. the same evening, as it was then near high water, George Rogers, the pilot, was called and came on deck, where he remained in charge of the said ship until after the collision; *that* in consequence of the strong wind from N. N. E. the "Northampton" did not begin to swing to the ebb tide for a considerable time after high water; *that* as soon as she began to swing, which she did with

(a) In the somewhat similar case of the "Montreal" (March 18. 22. and 24. 1853) it was contended that the services of the pilot ended when she anchored off the Albert Dock wall, but the Court was clearly of opinion that the so anchoring was no inter-

ruption of the original agreement, and that proceeding to the Queen's Dock, when the tide suited, was one continuous service, and that therefore at the time of the collision the pilot was compulsorily employed under the Liverpool Pilot Act.

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her stern to the westward, on the Cheshire shore, the pilot ordered the helm to be put to port, but *that* as the ship came round, the force of the wind upon her larboard quarter drove her in towards the landing-stage aforesaid, until her anchor checked her and brought her up, head to the tide, whereupon the strong N. N. E. wind drove her ahead, and her chain got under the quarter of the schooner "Feronia," which had then recently been brought up so near to the "Northampton," as to give that vessel a foul berth; *that* the said schooner in consequence of the chain so getting under her quarter, began to swing athwart the tide with her head to the eastward, and the "Northampton's" jib-boom passed over her bows, and fouled her foremast; *that* thereupon, by the pilot's directions, the "Northampton's" yards were immediately braced sharp up, and all the remaining cable paid out, by which means, and by the schooner's head sail being set, the "Northampton's" jib-boom cleared the schooner's foremast, but got between the fore and mainmasts; and the tide kept forcing the schooner against and under the ship's bows; *that* the additional strain on the "Northampton's" cable then caused her to begin to drive, but *that* her helm being, by the pilot's directions, kept to port, her head sheered more to the westward, and her larboard anchor caught the schooner's larboard bulwarks, and thereby did some damage; *that* the schooner at length sheered clear with her head to the N. E., and the ship immediately brought up, not having drifted more than twice her own length during the whole time, and remained there at anchor until the following day, when she was taken, still in charge of the said George Rogers, into the Bramley Moore Dock. And after denying several averments on the part of the "Feronia," it alleged *that* collision was entirely occasioned by the want of care and skill of those on board the said schooner "Feronia," in bringing up as they did in a foul berth or otherwise; and *that* the said collision, if imputable to any one on board the "Northampton," was occasioned solely by the neglect, default, incompetency, or incapacity of George Rogers, the pilot, who, as well at the time when the said ship came to an anchor, as afterwards, until the collision, remained solely and entirely in charge of the said ship, and all whose orders were implicitly obeyed by the officers and crew of the said ship; *that* by the provisions of the said Act 5 Geo. 4. c. 73., the master of the "Northampton" was bound (a) to receive on

(a) Exemption on the ground of having a duly licensed pilot on board must be pleaded specifically. In the "Philomele" (March 18. 1853) the

Court said, "It is stated in the defence that the galliot had on board a duly licensed pilot and three assistants; but it is not said under

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board, and deliver over the charge of the said ship to the said George Rogers, or to any other duly licensed pilot who might first have presented himself, and *that* by the 32nd section of the said Act, every duly licensed pilot who shall pilot or conduct any ship or vessel into the said port of Liverpool, is required to take care (if need be) to cause such ship to be properly moored at anchor in the river Mersey, and afterwards to conduct such ship into one of the wet docks within the said port. *That* by reason of the premises, and of the provisions of the said Act, and also of the General Pilot Act, the owners of the said ship are not liable for the damage alleged to have been sustained by the owners of the "Feronia."

The reply denied *that* the "Feronia" gave the "Northampton" a foul berth, and alleged *that* the place where the schooner was brought up was about half a cable's length from the landing-stage at Liverpool, in a clear and open berth, and nearly half a mile from the "Northampton"; *that* it would have been impossible for the two vessels to have come into collision unless either the one or the other had dragged her anchor; *that* in the state of the weather and tide in the Mersey at the time when the "Northampton" brought up, it was the bounden duty of the master to have had her top-gallant yards sent down, and her top-gallant masts struck, and *that* had that been done, and had her chain been veered out to an end, in all probability the "Northampton" would not have driven, and so no collision would have occurred between the two vessels; and it further denied, *that* when the "Northampton" first drove, George Rogers, her pilot, was on deck, and in command of her; and alleged that he was below, and *that* there was no persons whatsoever on the deck of that vessel until just immediately before the collision.

The rejoinder denied the averment as to the top-gallant masts and yards, and alleged, on the contrary, that the wind being N.N.E., the "Northampton" was less likely to have driven down with the ebb tide with her top-gallant masts and yards set than if they had been lowered; it further denied the averment respecting the pilot, and that there was no person on deck until just immediately before the collision.

The case was argued on the 4th and 7th of November, by

what Act of Parliament he was taken, or whether it was compulsory or not, or whether any blame attached to him. If it had been intended to raise the question of the exoneration of the owners, it ought to have been stated explicitly that all the orders of the pilot were duly

obeyed, and that if any mistake was made, it was attributable to him. The question not having been raised, it would be injustice to the other party, who has had no opportunity of defending himself, if I were to take cognizance of it."

Dr. *Addams* and Dr. *Twiss* for the "*Feronia*"; Sir *J. D. Harding* Q. A., and Dr. *Bayford* for the "*Northampton*."

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Summing-up.

Dr. LUSHINGTON, addressing the Trinity Masters (a):

Gentlemen,—To a very considerable extent I concur in opinion with her Majesty's Advocate, that many of the facts in this case are not the subjects of dispute between the parties; but I am afraid, from the nature of the case itself, that that circumstance will not relieve me from performing my bounden duty, if necessary, of setting forth, somewhat at length, the facts of the case. I do not mean that it will be requisite to go into the evidence; that has been fully discussed, and you are perfectly masters of it. But it will be necessary, before I conclude, to bring under your consideration, not merely questions of fact, but I should say, questions of nautical knowledge, in addition to matters of fact, in order that I may form my opinion on that part of the question which rests on me to determine — namely, who is responsible for the consequences of misconduct?

I will begin by an observation in which, I trust, you will concur. I apprehend the law to be clearly this — that whenever a master is on shore, and a ship is left in charge of the mate, or any one else, the matter stands in the same position with respect to the law, and in all other respects, as if it had been the master himself. That is a general principle from which we cannot depart. I should just observe, in passing, as to the case of the "*Feronia*."

The master of a vessel being absent, his responsibilities devolve upon the mate or other person left in charge.

Subject to your better judgment, it appears to me that she could cause the collision only from the adoption of two propositions — first, assuming that she had taken a foul berth in her original position, then she might be to blame; and secondly, supposing, from any fault in the anchors, she parted from them, innocently or otherwise, she might have occasioned the collision. Now, let us consider a little the circumstances of the case, and see how the charge proceeds.

The action is brought by the "*Feronia*," which is a small vessel, under 100 tons burthen, and which came up the river Mersey after the period when the "*Northampton*" had come to anchor opposite St. George's Pier Head, with her best bower anchor, and sixty fathoms of chain. It is agreed on all hands that it was a light night. With regard to the wind, it appears to me that the description is, it blew during the night from the N.E. with occasional squalls. It is alleged, on behalf of the "*Feronia*," that about 1 A.M., on the 24th, the "*Northampton*"

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came across from the Cheshire side of the river, dragging her anchor, apparently about to pass under the stern of the schooner, distant about forty yards. You have had a great deal of discussion as to dragging her anchor and driving, and, of course, that I must leave entirely to your consideration. I may, hereafter, think it necessary to advert to the distinction between driving and dragging. She says the "Northampton" broke her sheer, and came with her stern against the schooner. She subsequently alleges that the "Northampton" ought to have sent down her maintopmast, top-gallant mast, and so on. This is her case against the "Northampton."

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the "North-
ampton."

Now the case of the "Northampton" I would rather read in her words, that I may not misstate it. She states, "that as soon as she began to swing," which is represented to have been some time after the tide began to ebb, and the tide seems to have ebbed somewhat before twelve o'clock at night, "which she did with her stern to the westward of the Cheshire shore, the pilot ordered the helm to be put to port, but that, as the ship came round, the force of the wind upon her larboard quarter drew her in towards the landing-stage until her anchor checked her and brought her up, head to tide, whereupon the N.N.E. wind drove her ahead; and her chain got under the quarter of the schooner "Feronia," which had then been recently brought up so near to the "Northampton" as to give that vessel a foul berth." Here it is distinctly alleged, on behalf of the "Northampton," that the cause of collision was the "Feronia" having given the "Northampton" a foul berth. Then they go on: — "In consequence of the chain so getting under her quarters, the schooner began to swing athwart the tide, and the collision took place," &c., with which I need not trouble you. Then they allege that the schooner at length sheered clear with her head to the N.E., and the ship immediately brought up, not having drifted more than twice her whole length during that time, according to the statement made here. Then they go on to allege that the "Northampton" did not drag her anchor at all until the "Feronia" got across her bows, and thereby brought a severe strain upon her anchor and cable.

If the "Feronia" got across her bows, it must be from the "Feronia" being in a foul berth, or because the "Feronia" moved from her original berth, otherwise the collision could not possibly have taken place. With regard to whether she was in a foul berth or not, that will be a question for your consideration; but, with respect to the "Feronia" having moved from her berth towards the "Northampton," it certainly appears to

me that there is no evidence that she did so. This being the state of the case, in order to ascertain the cause of the collision and who, in the eyes of the law, will be to blame, we must determine, first, certain questions of fact; secondly, who is to blame according to nautical practice, which will be your department; and, thirdly—which will be my department of the case—who is legally responsible for the damage. You will ascertain from the evidence, so far as you think it important, whether the “Northampton” anchored on the Liverpool or Cheshire side of the river, and then whether she parted from her anchor prior to the collision, or whether, supposing there to be a difference, she drove with or dragged her anchor.

CAPTAIN OWEN. The difference between driving and dragging I take to be this. If a ship lying at anchor, from the strength of the tide, drifted with her anchor, that would be driving; if the wind drove her across the tide, and she fairly dragged her anchors, that would be dragging.

DR. LUSHINGTON. Let me put my notion of it, and then you shall correct me if I am wrong. The river here was lying north and south, and when this vessel swung to her anchor, her head would be to the south. Now, if by reason of the force of the tide she had drifted down the river, that is driving; but if her anchor had gone after her, she would both have drifted and dragged her anchor.

In this state of the case it is alleged, on behalf of the “Feronia,” that the wind took the “Northampton,” and sent her across the river towards the “Feronia.” But I will put the case in the alternative. Assuming for a moment that you come to a determination in the affirmative that she drove or dragged, would she, or ought she, to have taken any measures to prevent the collision? Ought she to have sent down her top-gallant masts and yards? Again, if she ought to have taken measures, and did not, who was to blame,—the pilot solely, or the officers in charge? That will be a nautical question.

I will now draw your attention to the case of the “Christiana” (a), which, in its circumstances and facts, is very different from the present; and the real consideration will be, whether these differences amount to a distinction. We cannot expect to have any two cases the same in every respect. The “Christiana” was in the Downs, in a gale of wind, and did not send down her yards, topmasts, and so on, and, in that case, it was the opinion of the Trinity Masters who then attended, and it has since been affirmed by the Judicial Committee (b), that

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Difference be-
tween driving
with and
dragging the
anchor.

The present
case different
from that of the
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The evidence of defective watch on board the "Northampton."

*Definition of
foul berth.*

it was the duty not merely of the pilot, but of the master as well, to take that precaution. The difference is very clear: the distinction I leave to you.

There is another question I shall put, because it is raised in the pleadings, though it does not appear to me there is any evidence to establish the charge, whether there was an adequate watch on board the "Northampton." I cannot say I am satisfied, from the evidence adduced by the "Feronia," that there was any defective watch at all. Then, secondly, you will have to determine, with regard to the "Feronia," whether she was in a foul berth or not, the evidence being, so far as my opinion goes, strongly to the contrary. If I correctly understand this matter, it appears to me—assuming, for a moment, that the "Feronia" was not in a foul berth—that fact is of considerable importance. If I understand the meaning of the words "foul berth," I apprehend that the "Feronia" was not in a foul berth; the two vessels could not have come in contact, except by the one or other moving from her former position. If one vessel anchors there, and another here, there should be that space left for the swinging to the anchor, that, in ordinary circumstances, the two vessels cannot come together. If that space is not left, I apprehend it is a foul berth. (a) It is quite clear, from the case of the "Feronia," that the pilot alone is responsible as to whether there is a foul berth or not.

The Court and the Elder Brethren having retired for consultation, on their return

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DR. LUSHINGTON said: I addressed to the Trinity Masters the questions in the following order: 1st. With regard to the "Feronia," whether she was in foul berth? *Answer.* No. 2nd. Whether, previous to the collision, she moved or not? *A.* No. 3rd. Whether the "Northampton" dragged her anchor, or whether she drove, and in either way occasioned the collision? *A.* She did drag her anchor, and so occasioned the collision. 4th. Could she, and ought she, to have taken any measure to prevent the collision? *A.* Yes; by letting go the other anchor. 5th. Who was to blame for not letting go the other anchor. *A.* The pilot exclusively. 6th. Ought she to have sent down her top-gallant mast and yards? *A.* It was advisable to have done so; but, under the circumstances of the case, not doing so

(a) In the cases of the "Countess of Morley" (Nov. 22. 1853) and the "Highland Chief" (Dec. 7. 1853) the Court pronounced against those vessels, on the ground that they had

anchored too close to the vessels with which they came into collision, and had thereby given them a foul berth.

did not cause the collision. Under the circumstances it appears to me that the collision was occasioned by omitting to let go another anchor, and was the fault of the pilot exclusively; and in a previous case I have determined that the owners are not responsible. I pronounce against this claim for damage, but give no costs. (a)

Proctors for the "Feronia," *F. Clarkson*; for the "Northampton," *Rothery*.

(a) In the case of the "Presto" (Nov. 17.) there was a similar result. The collision occurred in the Thames; the "Presto" was held to blame, but her owners were exempted by reason of a duly licensed pilot being on board and solely in fault.

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THE "ORBONA."

THIS was an action by the owners, master, and crew of the barque "Poitiers," for services rendered on the 20th January, 1853. The value of the property salvaged was 5082*l*.

The "Orbona," a barque of the burthen of 292 tons, sailed from London, with a crew of eleven hands, besides the master, on the 1st of January, 1853, bound for Glasgow, with a cargo of wheat. She met with rough weather; and about 3 o'clock A. M. of the 20th, whilst close hauled to the wind on the starboard tack, about twenty-five miles to the southward of the Needles, was run into by the barque "Actæon" (b), which carried away her bowsprit, and then, swinging round, also carried away her cutwater, and the sails and stanchions on her starboard side, stove her deck, and did her other very considerable damage. While separating from the collision, the master and crew of the "Orbona" (two only excepted) succeeded in getting on board the "Actæon," which was soon carried away some distance from the "Orbona." The "Orbona" was thus left disabled, with only two men on board, when the "Poitiers" discovered her, and came to her assistance.

The act on petition, besides the usual exaggerations of the merit of the service, alleged, *that* the "Poitiers" incurred a detention of five days, at an expense to her owner of at least 6*l*. per day for wages and provisions, and of 30*l*. for dues and other disbursements, necessarily consequent upon such detention; *that* she is of the value of 6800*l*., and was chartered by the British Government for the conveyance of troops, and *that* the stores and provisions for the use of such troops, together with the stores and provisions for the ship's use, were of the value of 3200*l*.; *that* the freight for the intended voyage amounted to

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Salvors in possession of a vessel abandoned by all her crew but two, who had been unable to effect their escape, would not be bound to delay their course for the sake of taking on board again the crew of that vessel. A policy of insurance is not rendered void by deviation to assist a vessel in distress.

Pleadings.

(b) *Vide post*, p. 176.

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the sum of 4500*l.*; *that* had she been lost in rendering the services aforesaid her *owners would have forfeited all insurance*, and would have been liable to the Government for the value of the provisions for the troops; *that* her owner would 'also have lost her freight, and *that*, by rendering the services, property of the value of 14,500*l.* was placed in jeopardy, &c.

The answer, *inter alia*, pleaded, *that* after the collision the "Actæon" lay to till daylight, when she descried the "Orbona," about three miles on her weather beam, and thereupon made all possible sail to beat towards her, but *that* when she had arrived within about half a mile of her it was discovered that she had just been boarded by a boat's crew from a vessel which proved to be the "Poictiers"; *that* the "Actæon" was then run under the stern of the "Orbona," which by that time was under sail, and those on board her were hailed by the master of the "Orbona" to heave to and permit him and the rest of his crew to come on board; but *that* instead of so doing one of the men on board the "Orbona" (since ascertained to be the second mate of the "Poictiers") only answered "All right," and the "Orbona" was kept on under sail; *that* all three vessels proceeded in company for the Motherbank, where the "Orbona" was brought to anchor about 4.30 P.M. of the same day; *that* the "Orbona" was immediately boarded by her master, who asked the second mate of the "Poictiers" what he meant by not heaving the "Orbona" to, and letting him and his crew come on board when the two vessels were so close, and as he had been hailed to do; to which the said mate replied, that he was only a servant, doing as he was told, and he had had his orders, &c.

This was all denied in the reply.

Sir J. D. Harding Q. A. and Dr. Bayford appeared for the salvors; Dr. Addams and Dr. Twiss, for the owners.

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The "Poictiers," proceeding from London to Cork under a Government contract fell in with the "Orbona,"

DR. LUSHINGTON. This is a claim preferred on behalf of the owners, master, and crew of a vessel named the "Poictiers," of the burden of 736 tons, and manned with thirty-one hands. She was proceeding, at the period when this transaction took place, from the port of London to Cork, under a contract with the Government. It appears, on the 18th or 19th of January, just antecedent to the time when the collision of which I must presently speak occurred, she had met with very tempestuous weather. In the course of the morning of the 20th of January, the vessel proceeded against — named the "Orbona," of the burden of 292 tons, with a crew of eleven hands, — had come into collision with a vessel named the "Actæon"; and in con-

which was left with only two hands on board,

sequence of the alarm arising from it, the master and eight of the crew abandoned her, and jumped on board the "Actæon," for the preservation of their lives. There were on board this vessel of 292 tons only two seamen, who either did not or could not attempt to go on board the "Actæon."

In that state the vessel remained until between nine and ten A.M., when she was descried by those on board the "Poitiers"; and as soon as the master of that vessel saw her, and perceived that she had a signal of distress flying, and had suffered some damage, though to what extent he could not know, he determined to bear down, for the purpose of rendering assistance; and then, according to his own statement, he was desired by the two persons on board to come to their aid. He desired his crew to volunteer, being reluctant to give an order, in consequence of the danger to which he apprehended they would be exposed. With regard to that danger, which is not an unimportant circumstance in this case, I cannot help thinking—looking at the description of the weather, and even softening the description down, as we are generally accustomed to do, when strong statements are made, and at the condition of the vessel itself, being left with these two men on board, and in the damaged state she was,—the boarding was attended with some degree of danger, and no doubt great difficulty. However, at last she was boarded by four men, sent to take charge of her, the boat being manned by four other persons. I cannot think that this danger was diminished by the circumstance stated by counsel, supposing it strictly accurate, that the four persons jumped at one spring. I apprehend that they would jump when on the top of a wave, which would give them the opportunity of springing to get hold of the rigging, which they did. But this proves to me, if they were under the necessity of jumping to get on board the vessel, it could not be at that time very smooth water, or be done with great facility. Having got on board the vessel, they proceeded to do what was necessary in order to bring her to a place of safety; and the wind having gone round to the westward, they proceeded to conduct her to the Motherbank.

There is no doubt this vessel had received considerable damage, and it is abundantly clear that she must have been in considerable danger, having been left with such damage, at such a season of the year, with only two men on board. It is quite unnecessary to dwell on circumstances which appear to me to lead to conclusions so inevitable as such facts do. The ship having been so conveyed to the Motherbank, the service in itself would be very meritorious, as being the means of saving

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and with some
danger and
difficulty sent
four men on
board to take
charge of her.

The "Orbona" had received considerable damage by collision with a vessel called the "Actæon," but was safely conducted by the salvors to the Mother-

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"ORBONA."*Judgment.*bank;—a very
meritorious
service.The state-
ments on
behalf of the
"Orbona,"
even taken
from the pro-
test of the
master,

the property and saving the lives of the two individuals on board the vessel.

Now let us consider whether the statement on the other side does to any, and what extent, detract from the services of the salvors, or diminish from the reward which I ought to give, supposing those facts strictly true, and not counterbalanced by other facts. I look at the protest made by the master and two of the crew of the "Orbona,"—that is perhaps as favourable a document as I can resort to for the purpose of seeing what is the real case of the "Orbona" as set up on behalf of the owners. I need not go through the preliminary circumstances as to the collision that took place with the "Actæon," but I will commence where it is said that "the master and nine of his crew, fearing that his vessel would sink, and seeing that the stranger was rapidly driving past this appearer's vessel, and fearing that there might be no other chance of escape, scrambled on board the stranger only half clothed, as they had rushed from their beds, and found the stranger to be the barque 'Actæon,' of Glasgow, Captain Benson; and this appearer then found that two of his crew had been left in this appearer's vessel. That the appearer then requested the master of the 'Actæon' to lie to till daylight, in order that the appearer and his crew might get on board their vessel again if she should not founder"—which he expected, of course, she would do—"which he did; and at daylight this appearer discovered his said vessel."

It is a matter of no importance, that the Court should trouble itself to decide whether the "Actæon" did or did not lie to to assist the vessel. The probability is, she did, and for the reasons stated by counsel, that it would have been atrocious conduct on the part of the master of the "Orbona," whensoever the collision took place, if he had abandoned, not the property only, but the lives of these persons, without some effort to save it and them. I take it for granted he did lie by. "He discovered his said vessel about three miles upon the weather beam of the 'Actæon,' whereupon the 'Actæon' made all possible sail to get on board the 'Orbona,' and cleared away the boat of the 'Actæon' to be ready to board her, and also hoisted the ensign upon the 'Actæon's' mizen rigging, in order to be a signal to the 'Orbona's' men, still on board." Now, according to this statement, the appearer saw his own vessel about three miles upon the weather beam of the "Actæon." I do not know that I have accurate *constat* of the wind; it was subsequently W., and if it was W. at the time, the "Actæon" would have had no difficulty, in a less space of time than is represented here, in coming up to the "Orbona."

If the wind was the other way, of course it would occupy more time, she having to go contrary to the wind.

However, he says the "Actæon" made all possible sail, and also hoisted the ensign, "and about an hour and a half after the 'Actæon's' signal had been hoisted, the 'Orbona' hoisted a signal of distress." Now, this is a circumstance which, I do think, does require some little consideration; because, if the persons on board the "Orbona" were aware that that was the "Actæon," and she was coming down to her assistance, I do not understand why they should have hoisted a signal of distress at so late a period. The hoisting of a signal at all clearly shows that they had no confidence in the "Actæon" coming to their assistance. "When the 'Orbona's' signal was hoisted," the protest says, "the 'Actæon' was beating up towards her, and was then not more than two miles distant, the 'Actæon's' signal being then flying; that soon after the 'Orbona' hoisted her signal of distress, this appearer discovered a vessel running down upon her, before the wind, which afterwards proved to be the 'Poitiers'; and when the 'Actæon' was within about a mile, they saw the 'Poitiers' close to the 'Orbona,' and some of the 'Poitiers' men boarded her, it being then about 10 A.M."

Now, I am not about to attempt to solve the difficulty of how it happened that, from daylight in the morning till 10 A.M., the "Actæon" was occupied in traversing this short space of sea. I am not quite satisfied from which quarter the wind was blowing, though I suspect it was from the east, and got round to the west in the afternoon. But the fact was, the "Actæon" did come up, and hailed the "Orbona" to heave to. I will take it for granted that she was told the "Actæon" had the crew of the "Orbona" on board, and, I do not think, under the circumstances in which the "Orbona" was placed, it was any part of the duty of the salvors to have hove to, and taken on board the master and crew, who had gone on board the "Actæon." I do not say there are no circumstances in which it is the bounden duty of the master and crew to come on board and resume the control of their own vessel; but not under circumstances like these. Looking at the season of the year, and the state in which the vessel was in, the salvors had an undoubted right to keep possession and carry the vessel to a port of safety. I dismiss, therefore, some of those facts put in direct contradiction.

It is always difficult to determine, when one set of persons who stand precisely in the same degree of veracity as another are directly at issue, which are speaking correctly, but whichever it may be, it makes no material difference. I, therefore, proceed to my adjudication without reference to these facts.

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THE
"ORBONA."
Judgment.

do not detract from the merit of the service.

Under the circumstances, the salvors would be justified in keeping possession of the vessel, and taking her into port without delaying to take on board the crew which had abandoned her.

1853.

THE
"ORONA."

Judgment.

The service though short was meritorious.

It is not true in law that if a vessel goes out of her way to assist another, her insurance is void.

Value of property saved being 5082*l.*, the sum of 700*l.* allotted.

It was a most meritorious service, and I am bound to give an adequate reward; the service, however, did not last a long time, and was effected without great difficulty or risk, beyond boarding the vessel. There are circumstances mentioned in the act on petition which do not weigh with the Court, and which are put in to influence the case. It is said, that the insurance of the "Poitiers" was void. That is not true in law, for it is not the law that, if one vessel goes out of her way to assist another in distress, the insurance is void. It has often been stated, but in the only case in which it has been agitated, — for it did not come to a final decision — the Judges were of opinion that it did not. (a) I leave that out of consideration, and looking at the value, 5082*l.*, I shall allot the sum of 700*l.*

Proctors of the salvors, *Deacon*; for the owners, *F. Clarkson*.

(a) In *Lawrence v. Sydbotham*, (6 East, 52.) the point was touched upon in argument, and Lord *Ellenborough* C. J. said, "This does not affect the question how far slackening sail from motives of humanity to succour another ship in distress is allowable; nor is it necessary to touch upon it. Perhaps when such a case does arise, it may be found to be for the general benefit of all insurers to allow such succour to be given without imputing deviation to the succouring ship." And *Lawrence* J. said "as to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress."

In America it is laid down that deviation to save life would not, but

merely to save property would, void the insurance. Mr. Justice *Story* said, "I entirely agree with my lamented brother Mr. Justice *Washington*, in declaring that no stoppage on the high seas for the purpose of saving life is or can be deemed a deviation from the voyage so as to discharge the insurance on ship or cargo. The duties of humanity call upon every human being to do such acts of mercy and charity; and that duty is enforced by all the authoritative precepts of Christianity, which no one is at liberty to disregard. But I further agree with him in holding that any farther stoppage for the purpose of saving property, is a deviation from the voyage and discharges the underwriters." *The ship "Henry Eubank" and Cargo*, 1 Sumner, Am. Rep. 424.

THE HIGH
COURT OF
ADMIRALTY.

Nov. 11.

A vessel of the value, with her cargo, of 17,337*l.*, got off the rocks by the assistance of a pilot and about thirty-four hands, for which the owners tendered 250*l.*; but the Court awarded 400*l.*, and held, that the fact of an

THE "PERSIA."

THIS was an action brought by Hugh Williams, a pilot, and the masters and crews of five smacks, consisting together of thirty-four hands, against the "Persia," for services rendered to her on the 11th July, 1853. She was a vessel of 2002 tons burthen, laden with timber, and, upon a voyage from Quebec to Liverpool, got upon or between some rocks, about half a mile to the northward of Port Griffith Creek, on the S. W. coast of the island of Holyhead. Mr. Williams, having heard of the accident, proceeded overland, and found her, according to his account, upon two ledges of rocks, on which she was rolling heavily. His services, as well as those of the "Hercules" steamer, were

at first rejected by the master, who had telegraphed to Liverpool for some steam tugs, and expected them at 2 o'clock in the afternoon; and the principal ground of defence was, *that* Captain Skinner, of the Royal Navy, government inspector of steamers at Holyhead, came, and, holding a conversation with the master from the rocks, represented himself as a friend of the consignee of the ship, informed him that it would be impossible for the tugs to arrive from Liverpool to get the ship off that tide, and advised him to endeavour to get her off by running a hawser out astern, and heaving upon it; *that* the master, on receiving such information from Captain Skinner, immediately acceded to his recommendation, and Captain Skinner then gave directions to various persons to assist, &c., &c.; *that* the entire direction of any measure taken in laying out the anchor was done at the suggestion of Captain Skinner and Captain Davis, the master; *that* Hugh Williams and the other boatmen were promised that they would be paid for their services whatever was right; *that* the master throughout considered that Hugh Williams and the others were employed under the guidance of Captain Skinner, and had no idea whatever that he was allowing unconditional salvors to take any part in getting the "Persia" off; *that* otherwise the services could and would have been performed by his own ship's crew, &c., &c.

Dr. *Addams* and Dr. *Twiss* appeared for the salvors; Sir *J. D. Harding* Q. A. and Dr. *Bayford*, for the owners.

DR. LUSHINGTON. There are several matters which have been mentioned by counsel in arguing this case, which, it appears to me, it will not be necessary to enter upon; because, if they have any bearing on the decision to which the Court is about to come, they have, in my opinion, a very remote one. The first question which I have to solve is, What will be the proper reward to be paid to the present salvors for the services which they have rendered to this vessel — supposing they have rendered them, — without any reference to Captain Skinner himself? That they are entitled to some reward is not the question which I have to discuss, because the sum of 250*l.* has been tendered, and the simple question is, whether that is enough, or whether I ought to give more. Presuming I can settle this, I am to take into consideration whether what has been averred by Captain Skinner ought or ought not to detract from the sum which it will be proper to award to Hugh Williams and the other salvors. I will briefly allude to some of the circumstances.

This vessel — in what way or from what cause is not of the slightest consequence — got upon the coast two miles to the

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THE
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officer in the navy, who held an official appointment there, having given directions to the salvors, did not detract from the merit of their service.

Judgment.

1853.
 {
 THE
 "PERSIA."
 Judgment.

S. W. of Holyhead, on the night of the 10th July ; and, it is agreed on all hands, got on a rocky coast, was jammed on two rocks, and there remained fast, with very deep water, as stated, on her stern. The question which seems then to have been agitated was, in what way she could be most effectively got off, and how far it was prudent to wait till assistance could be derived from another quarter. It appears that Williams, the chief pilot, when he first tendered his services, was rejected by the master of the "Persia." Undoubtedly the master of the "Persia" had full right to the exercise of his own discretion, as to whether he would accept assistance or not ; but it is a totally different question whether he exercised that discretion wisely or unwisely under the circumstances of the case. He was placed in authority by the owners, the property was entrusted to his charge, and he had a right to use his own judgment. It appears that assistance was offered by the "Hercules" steamer, and he had a right to discard it. The course he adopted was, to send the mate to Holyhead, and from thence to telegraph to Liverpool for the assistance of four tugs. These tugs he expected would arrive at 2 P. M., when it would be high water. It is clear he was mistaken, both from information received and from the fact also. One of them did not reach Holyhead till 7 in the afternoon.

Having stated these facts the first point to which the Court will direct its attention is this : What was the degree of danger in which the vessel was placed ? because the amount of the reward is measured, with other circumstances, by that danger at the time when the services were rendered her. The vessel was jammed between two rocks, and it is quite clear was incapable of extricating herself. If any change had taken place in the weather she would have been placed in extreme peril ; as it was she was exposed to considerable danger, because she suffered, what is not denied, very considerable damage. It is quite true the cargo was not of a description to undergo injury from becoming wet ; at the same time, if the vessel had gone to pieces, I apprehend the cargo would have been in imminent danger of being lost.

But it may be said that, although there was danger, yet it was not imminent ; but Captain Skinner, a friend of the consignees, and fully competent to form an opinion, and all the people at Holyhead who knew that the tide was flowing, unite in opinion that there was that degree of peril that it was not right to wait for assistance, but that it was the duty of the master to avail himself as quickly as possible of that which was at hand. The master having refused assistance, Captain Skinner, who knew what was best for the interest of the owners, advised

the master, in the strongest terms, to take assistance, which could only be rendered by laying out an anchor. The master thinks he ought to be influenced by the judgment of Captain Skinner. I see no blame attaching to the master for yielding to that opinion; and I attach no blame to him for having been a little obstinate in the first instance. The master must have weighed the chance of the four tugs coming against the chance of a suit in the Admiralty Court. It was very clear that if the vessel was removed from the situation in which she was placed there would be such a suit, or there would be an arbitration, which was only one degree less expensive. In considering the reward to be given, there is another fact to be looked at: in nineteen cases out of twenty, if the insurers had seen this vessel, of the value of 17,000*l.*, jammed between two rocks, I think they would have been ready to give 250*l.* for her rescue. That is a view I am accustomed to take when there is doubtful danger, which was precisely the condition of this vessel. Looking at all the circumstances of the case, I shall award the sum of 400*l.*

Proctors for the salvors, *Rothery*; for the owners, *Gostling*.

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THE
"PERSIA."
Judgment.

THE "BATAVIER."

THE HIGH
COURT OF
ADMIRALTY.

Nov. 25.

THIS was a suit brought by the master, owners, and crew of the steam-tug "Thomas Petley," for salvage remuneration, for services rendered to the "Batavier," a steam-vessel of 227 tons burthen, on the 9th of May last. The action was entered for the sum of 1500*l.*

A passenger steamer on a voyage from London to Rotterdam, having broken the main shaft of her engines, engaged a tug to tow her over to Holland, being a distance of about ninety miles, which was done successfully. A tender of 175*l.* having been rejected, was held to be sufficient. Salvors condemned in costs.

On the main facts of the case there was little or no dispute. The "Batavier," a regular trader between London and Rotterdam, left London at noon, on Sunday, the 8th of May last, with a small general cargo and eighteen passengers; passed the Tongue Light and the entrance of the Thames about seven o'clock P.M., and about nine o'clock broke the main shaft of her engines. Her master made signals by blue lights and rockets, which were seen by the "Ravensbourne," a steam-vessel on her voyage from Antwerp to London. She bore down to the "Batavier," and took her in tow, but cast her off, after a short time, about fifteen miles from the North Foreland, at the request of the master of the "Batavier," who found that her machinery was being injured by the strain, as the floats of the paddle-wheels had not been taken off. The "Ravensbourne" continued her voyage, and afterwards sent the tug "Thomas Petley" to the assistance of the "Batavier." The master of the tug, after some demur, agreed to tow the

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THE
"BATAVIER,"
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"Batavier" over to Holland, which he accordingly did, the "Batavier" having supplied him with coals for the voyage and the return. For this service the owners of the "Batavier" tendered the sum of 175*l.*, which was rejected.

Among other averments on behalf of the "Thomas Petley," it was alleged *that* the steam-vessel "Batavier," when taken in tow by the said steam-tug, "Thomas Petley," was in a position of great peril and danger; *that*, without the assistance of the said steam-tug, or of some other steam-vessel equally efficient, the "Batavier" could not on that day, or the following night, have reached a port of safety; *that* the wind would have prevented her getting into any English port; and *that* she could not have ventured to run to leeward towards the Dutch coast with the night coming on; *that*, consequently, she must have been exposed to the gale which blew on the night of the Monday and throughout the following day and night, and possibly, in her then disabled condition, would have been lost, together with her cargo and all on board; *that* she was taken instead to her port of destination by the said steam-tug, "Thomas Petley," and was thereby saved to her owners, together with her cargo and freight.

On behalf of the "Batavier" this was denied, and it was alleged *that* had there been any necessity or danger, she could easily have been taken in the first instance into Ramsgate, or afterwards into either Harwich or Yarmouth; and *that*, in fact, with the wind as it was, without the assistance of the said tug, the "Batavier" would, by sailing, have arrived at her port of destination almost as early as she did, the "Batavier" having actually sailed during the greater part of the time faster than the tug could steam; *that* there was not anything whatever to have prevented the "Batavier" going with perfect safety over to the Dutch coast; and *that* had there not been passengers on board, who were anxious to arrive as soon as possible at Rotterdam, the services of the tug would not have been engaged.

Dr. *Addams* and Dr. *Bayford* argued the case for the salvors; Dr. *Haggard* and Dr. *Twiss* for the owners of the "Batavier."

Judgment.

Action being entered for the sum of 1500*l.*, and bail taken for 1000*l.*, the owners tendered 175*l.*

DR. LUSHINGTON. This is a suit for salvage, brought by the owners, master, and crew of a steam-tug, called the "Thomas Petley," and it appears that she is of eighty horse-power, and is manned by the master and five hands. She is engaged, as I collect from a card annexed to one of the affidavits, in the regular occupation of a steam-tug, between London and the Downs. The action was entered in the sum of 1500*l.*, but

bail has been taken to the extent of 1000*l*. The action having been entered on the 27th May, on the 30th the proctor for the owners of the "Batavier" tendered the sum of 175*l*., which has not been accepted.

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"BATAVIER."
Judgment.

The "Batavier" appears to be a vessel of 227 tons, and to have been engaged, for a great many years, between London and Rotterdam. A dispute was made as to her value, which was originally stated, by Mr. G. Bailey, to be 2000*l*. The salvors were not contented with that amount, and accordingly they took out a commission of appraisement. It now turns out that the value was 2800*l*. It was contended, in the course of the argument, that *ex necessitate* the tender must fail, because it was made upon the foundation of the value being 2000*l*., whereas it now turns out that it was little short of 3000*l*. I am not clear that that argument can altogether be pushed to that extent. It depends, in my judgment, on the circumstances of the whole case; upon the danger to the property, more than any other consideration, whether or not 175*l*. is an inadequate compensation for the whole of the service rendered. Whether it was adequate in the opinion of the owners or the salvors, or not, signifies nothing; the question is, whether the Court considers it a sufficient tender. Whether or not the property has been in jeopardy, be the value more or less, is one of the questions to which the Court must particularly direct its attention. I now come to the circumstances of the case.

Value of the ship being at first stated at 2000*l*., the salvors took out a commission of appraisement, when it was valued at 2800*l*. It does not, therefore, follow, that the tender of 175*l*. must *ex necessitate* be insufficient. For the question is not, what the owners then deemed adequate, but what the Court now thinks adequate compensation.

The "Batavier" was proceeding on one of her usual voyages on the morning of the 8th of May, and it is not unimportant to bear in mind the time of the year when she was prosecuting the voyage. It was at a season when, generally speaking, the weather is most favourable, and when the day is much longer than the night. She met with an accident by breaking her intermediate shaft, and was disabled from prosecuting her voyage, and prevented from moving by the medium of steam. The question is, not whether she was in danger by breaking the shaft, or at a subsequent time, but whether she was in danger at the period when the "Thomas Petley" came up to render assistance.

Circumstances of the case.

Her antecedent dangers, whatever they were, cannot affect the case. As soon as the accident happened, it seems she set her sails, and proceeded for an hour and a half, in what direction is of no importance. She finally came to anchor in the neighbourhood of the Kentish Knock, and there remained. At that time the "Ravensbourne" was seen approaching, and a signal was made to her, which must be deemed a signal for assistance, and which the master of the "Ravensbourne" states he would

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Judgment.

have made under similar circumstances. He comes down to her, takes her in tow, and, according to his evidence, continues to tow her for a period of three quarters of an hour, for the purpose of drawing her towards land;—of course, I understand from the expressions used, and from the whole tenor of his evidence, putting her in that situation that she would be in a place of perfect safety. Having placed her somewhere about eighteen miles on this side the North Foreland, he then quits her at the desire of the master himself, in consequence of damage being received by the "Batavier" from the straining of her machinery.

It is clear from the admitted facts that neither the master of the "Ravensbourne" nor of the "Batavier" thought the latter vessel in danger.

Now, let us see how the facts stand. It is by the desire of the master of the "Batavier" that the tow-rope is taken off; certainly he could not imagine himself to be in much danger if he permitted the "Ravensbourne" to leave him at that time. In the next place, the "Ravensbourne" did leave him; and the evidence of the master is, that he left her in perfect safety. Now, I do not rely upon this evidence, nor do I mean to give my assent to the statement, that Mr. Bacon is peculiarly the witness of the salvors, because he has been examined by them. I entertain no such idea. It was a very proper thing for the salvors to examine him, and it would have been proper if he had been examined on the other side. I take it that he is a witness who stands independent of both parties; whatever he states is not to be taken as the evidence of a witness for the salvors, but merely according to the rules of fair construction. I have no reason to think that he gave his evidence otherwise than fairly and truly, but possibly he might be under bias. I have no reason, however, to suspect it, except that he belongs to one steam company, and the "Batavier" to another, and there may be something like a jealousy of those employed only as owners of tugs. It may be so, or it may not; but I can have no reason to doubt the evidence he has given, namely, that the vessel was in perfect safety at the time. The *res gesta* prove the truth of what he has said. He would not have abandoned the "Batavier," nor would the master have allowed him, without remonstrance, nor would the passengers have allowed it, if there had been the least degree of peril. There was no danger at that time.

Now, let us follow up the case from the time of his quitting her* to the period when the "Thomas Petley" comes up to render assistance. It has not been argued that anything took place in the mean time. The vessel continued in the same situation, or nearly so; the weather had not altered her condition. The weather had been, previously, perfectly calm.

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 "BATAVIER."
Judgment.

Something of a breeze then sprung up, but it is not contended that the situation of the "Batavier" had undergone any deterioration between the time at which the "Ravensbourne" quitted her and the period when the "Thomas Petley" came up to render assistance. She comes up to render assistance in consequence of a message, conveyed with the consent of the master of the "Batavier," by the master of the "Ravensbourne." It does not appear from the evidence that any direct intimation was given by the master of the "Batavier" of the purpose for which the tug should come; he only desires him to send one. I apprehend I am correct in that statement. I know, in another part of the proceedings, it is stated that he intended to prosecute his voyage; but it is not so represented by Captain Bacon.

This being so, the tug comes up in the morning, a little before eight, and proposes to take him to Margate Roads, or to Ramsgate. The master of the "Batavier" says, "No, that will be inconvenient to me; I am desirous of going over to Holland, for the sake of my passengers, as speedily as possible; therefore I will take your assistance to go to Holland; not for any other purpose." After some hesitation, — at which I am not surprised, — the master of the tug consents to it; I say I am not surprised, because it was a matter out of ordinary business. The master represents that he was ignorant of the coast of Holland, and of the course to be pursued. He, therefore, stipulates that some person should be put on board to navigate her, and that a competent person should return in her as soon as the "Batavier" had been conducted to port. He also stipulated that he should have a sufficient quantity of coal for the performance of the service which he undertook to discharge, and to come back to the original destination.

Now, was there any danger, on the present occasion, from the nature of the service to be performed? Danger, in the present sense of the term, there certainly was none. I am aware it is represented, in the act on petition, that the ship was in danger; but, from the state of the weather, and the season of the year, as described in the evidence, I think it is impossible for a single moment to maintain that this vessel was placed in the slightest degree of risk or danger. I come then to consider, whether taking this vessel, disabled for the use of steam, to Helvoetsluys, and the time the steam-tug would be occupied in coming back, will be properly remunerated by the sum of 175*l.* or not.

A great deal has been said about the sailing qualities of this vessel; of course I can only take the facts of the case. If I

No danger from the nature of the service performed.

The "Batavier's" sailing.

1853.

THE
"BATAVIER."*Judgment.*
qualities were
moderately
good.

trust to the representation of Captain Bacon, this vessel possessed very good sailing qualities; but it has been contended that that cannot be the case, and for this reason: if she was capable of performing the voyage, with a favourable wind, according to Captain Bacon's statement, in fifteen or eighteen hours, she would never have gone to the expense of having a steam-tug, to accommodate the passengers on board. But I am not prepared to accede to that argument. I apprehend it was not for the sake of particular individuals, but she was most desirous of performing her voyage, for the general credit of the service, and the benefit of the owners, with punctuality. He would adopt these means as a matter of prudence, if not of necessity; and therefore I see in it no argument against her being a good sailing-vessel; at the same time, looking at the description of the vessel, her age, and so forth, I do not apprehend that her sailing qualities were of the first character, taking it for granted that she was capable of sailing with favourable weather, and favourable weather she had the good fortune to enjoy.

She is safely
towed to Hol-
land. The
tug returns,
and, without
taking in
fresh coal,
earns 18*l*. by
towing another
vessel.

She is taken in tow between nine and ten o'clock, and is conducted to the port of Helvoetsluys. According to one statement, she arrives at one o'clock in the morning; according to the other, she arrives at four o'clock. This appears a subject of little importance; the service was successfully and well performed by the tug. The next question is, whether the tug was delayed or not at the port of Helvoetsluys, — that is of very little consequence. As to any damage done to her, I am of opinion that no such case is made out. When she comes to the neighbourhood of the North Foreland, the second mate of the "Batavier" leaves her, and she has plenty of coals on board, furnished at the expense of the "Batavier," to take a large vessel (the "Viceroy") in tow, for which she receives 18*l*.; a fact not so plainly stated in the early part of the proceedings as the Court would like to have seen. I may make the same observation with respect to other facts which are now cleared up.

The price
paid for ordi-
nary towage,
is no criterion
of such a ser-
vice;

The price paid for ordinary towage I disclaim as being a guide to the Court as to the sum which should be allotted to remunerate this service; yet, in one point of view, it may be useful. It appears, from the card before referred to, that to tow a vessel the size of the "Batavier" from London to the Downs, the charge would be 47*l*. The distance is 100 miles; but the tug only towed this vessel ninety miles; however, I disclaim that as a test. It is true that the tug was taken out of her ordinary occupation, and carried to a foreign port, where she was detained a certain length of time, and then came back in

safety, being provided, as I ought to remember, with coals by the owners of the "Batavier." The question is, whether 175*l.* is sufficient under these circumstances, the value of the property being nearly 3000*l.* The latter circumstance I hold to be of infinitely minor importance in a case of this description. I do not hold that the steamer was in danger or disabled; the service consisted in towing a dull sailing-vessel for the distance in question, and no more; and, taking all the facts into consideration, I must pronounce the tender sufficient, and I think it my duty to condemn the salvors in costs. (a)

Dr. Addams: We are entitled to the costs of the appraisement.

THE COURT: Yes, that follows as a matter of course. (b)

Proctor for the salvors, *Rothery*; for the owners of the "Batavier," *F. Clarkson*.

(a) The rule respecting costs in such cases is stated in the "Emu" (1 W. Rob. 16.); and in the case of the "Queen" (Nov. 16, 1853), the Court upheld the tender of 50*l.* but gave no costs; observing, "The rule I have endeavoured to follow is not to bind myself in all salvage cases to give costs against salvors, unless I think the tender was so large that the salvors in the exercise of a sound discretion could not do otherwise than accept it. Here I think the tender is sufficient, but is not so much as to lead me to blame the salvors for not accepting it. I therefore pronounce for the tender, but without costs."

In the case of the "Albatross" (Jan. 26, 1853), salvors had made an agreement for 60*l.*, which the owners actually paid, but took it back again because they were not satisfied with the terms of the receipt, and wanted a clause inserted therein to the effect that the 60*l.* included the service of a tug, whose assistance the salvors had taken. The Court said it would have condemned the owners in the costs of the suit, if it had not appeared that, immediately after the service, the salvors had refused to accept the 60*l.* unless a further sum was paid for the services of the tug, in which they were wrong. The Court decreed the 60*l.* to be paid, and condemned the owners in *half costs*.

In the case of the "Chancellor" (April 4, 1853), the Court upheld the tender of six guineas for towage service as under an agreement, and

condemned the salvors *generally* in costs, but condemned the owners in *all the costs incurred by their charges* of bribery and perjury, and by their insinuations against the salvors, that they had maliciously broken the hawser by which the vessel was being towed.

(b) The rule as to costs of appraisement is, that the salvors are entitled thereto when the value stated by the owners is wholly below the real value, and not otherwise. In the "Commodore" (Feb. 15, 1853), the owners stated the value to be 865*l.*; the salvors took out a commission of appraisement, upon which the value proved to be about 860*l.* The Court condemned the salvors in the costs of the appraisement, and said, "I think without any reason whatever a commission of appraisement is taken out, which ought never to be done except on good grounds, namely, that the value stated by the owners is wholly below the real value. It is not enough to say that a few pounds more are obtained by the appraisement. It is obvious that the decision never can turn on a sum of 10*l.* or 20*l.* where the value admitted is 865*l.*" And in the case of the "Felix" (April 4, 1853), the Court condemned the salvors not only in the costs of the appraisement, but all the costs that related to the value, expressing an opinion that the proceedings which had been adopted at Hull for obtaining the value of the ship and cargo were most unjustifiable and unheard of.

1853.

THE
"BATAVIER."
Judgment.

but, nevertheless, taking all the circumstances into consideration, the tender of 175*l.* is sufficient.

1853.

HIGH COURT
OF
ADMIRALTY.

Dec. 5.

The declarations of the master *are*, of the mate and seamen *are not*, admissible evidence against the owners of a vessel.

THE "ACTÆON."

THIS was a cause of damage by collision promoted by the "Orbona" against this vessel.

An act on petition and the answer thereto having been given in on behalf of the respective parties, objection was taken to the answer that it pleaded declarations and admissions of the master, the mate, and the pilot of the "Orbona," which could not be received as evidence against her owners.

Dr. *Addams* and Dr. *Twiss* appeared in objection to the answer; Dr. *Bayford* and Dr. *Deane* *contrà*.

Judgment.

It is open to either party to proceed by plea and proof, though the proceeding by act on petition is generally more convenient.

DR. LUSHINGTON. The first point for my consideration is, by what principle I ought to be governed in my decision respecting the present objection. This is a cause of damage; the proceeding is not by plea and proof, but by act on petition; and as it is in the power of either party to proceed, or to compel the proceedings, by plea and proof, it must be taken for granted that both parties acquiesced in the course which has been adopted; and they must, therefore, take any consequences which necessarily follow.

Proceeding by act on petition is always esteemed a very convenient mode in those cases which generally come under the determination of the Court, inasmuch as it affords greater facility for the production of the witnesses whose evidence is required.

The Court does not encourage objections to the pleadings in these cases, though they may sometimes be expedient.

An objection has now been taken against a part of the answer to the original act on petition. Though this is certainly not very common, and ordinarily speaking the Court would be desirous of discouraging it, yet there may be cases in which it may be expedient that such objections should be taken; and, according to the circumstances of the case, sustained by the Court.

The admissibility and the weight of evidence are two distinct questions.

Now, with respect to the objections taken in the present case, I have to determine, as it appears to me, this question, whether the facts stated in this answer, if proved by the evidence produced in the cause, would be admissible evidence or not. If it be admissible evidence, I must consider whether or not I am at liberty to reject it—the weight to be attributed to it not being the subject for my present deliberation. I take it to be essentially important in all these cases to bear in mind this distinction, whether there are certain facts admissible in evidence, and, if there are, what weight is to be attached to them.

It is my opinion that whatever may be admissible in evidence the Court has no right to reject; if it would be admissible at the hearing, the Court has no right to say "this will be of no importance." I may have a strong moral conviction that such is the fact, but, as a Judge, I have no right to act upon it. I remember, on former occasions, having to consider this question, not only in this Court but in the Prerogative and Consistory Courts, and I came to the conclusion in my own mind, though I do not say it was universally acknowledged and adopted by all who have occupied this chair, that it was not competent to a Judge to exclude that which was admissible, and to say "I will not allow it to be pleaded because it is not important." In my opinion no Judge has a right to make that statement; but he has a right at the final hearing to attribute that weight to it which he thinks should be attached to it. Such a course would be dangerous, because, in the first place, it would be considering what weight was to be given to a fact taken specifically; and, secondly, because I consider it to be contrary to the opinion of other Courts. For I apprehend it to be settled by the House of Lords that, if a Judge has taken upon himself to reject admissible evidence, however unimportant, there must be a new trial. I consider that an authority of great weight; and, though it may not be strictly binding on this Court, yet the principle ought to be followed.

Now, with respect to the declarations pleaded in this answer, they may be classed under two heads: the declarations made by the master, either immediately after the transaction, or in subsequent conversations; and the declarations of other persons, whether of the second mate, of the pilot, or of one of the crew of the ship, the owners of which are proceeding in the cause. After careful consideration, on a former occasion, I came to the conclusion I was bound to admit the evidence of the declarations of the master, because he was invested with authority by the owners, and, therefore, his declarations would be evidence against them. (a) I am not prepared to think, as at present advised, that such conclusion was erroneous.

With respect to the sailors and other persons on board, I come to a different conclusion. I am not inclined to consider them agents in the proper sense of the word, so as to bring them within the principle that the declarations of an agent are evidence against his principal.

I have, therefore, to see by whom the declarations objected to were made, and at what period.

With respect to the first, it is alleged "that when the captain

1853.

THE
"ACTÆON."
Judgment.

If evidence be admissible, the Court cannot reject it because it appears unimportant.

Declarations of the master of a vessel are admissible evidence against the owners because he is their agent,

But that principle cannot be extended to the mate or other persons on board.

(a) The "Manchester," 1 W. Rob. 62.

1853.

THE
"ACTÆON."
Judgment.

The declaration of the master cannot be rejected on the ground that his knowledge of the fact of which he spoke was derived from hearsay, though it may have but little weight.

If the Trinity Masters seemed to form their opinion on parts of the evidence which were inadmissible, the Court would not adopt their advice.

The principle of "declarations of agents" cannot be extended to the mate of a vessel, even when he was in charge of it.

of the 'Orbona' and the captain of the 'Actæon' were taking coffee together, shortly after the collision, the captain of the 'Orbona,' referring to the said collision, said it was a bad job, but that it could not be helped, as he was too close to the 'Actæon' before he could see her; or to that effect."

Here I stop: this is a declaration made by the master of the vessel "Orbona"; and, according to the principle I have traced out, I apprehend, unless there be something peculiar attaching to it, it is admissible, whatever may be its value.

Now, the objection taken to it was, that this man was not on the deck at the time of the collision, consequently it would be nothing that the declaration emanated from hearsay, and it was communicated to him. I am of opinion that I cannot take into consideration the fact that he was not on deck; and I cannot look into the facts pleaded in the proceedings in order to understand the peculiar weight attached to them. I am not prepared to say it would not be evidence if he only knew it from hearsay; it is the declaration of an agent, and I do not know any principle of law by which a declaration, because it might by possibility have been communicated by another party, is, therefore, prevented from being admissible evidence. I think, according to the principle I have stated, I am bound to admit it; the weight to be attached to it is a totally different consideration. We must ever bear in mind the distinction between the admissibility of evidence and its weight.

It has been said that the evidence, if inadmissible, will make an impression on the minds of the Trinity Masters; and, if it is inadmissible, it ought not to be there. The course I adopt is this, to tell the Trinity Masters, when they are considering the advice which is to be given to the Court, that if evidence is inadmissible it must be left out of the case; and, if I saw an instance in which, notwithstanding what was said by the Court, the inadmissible evidence had any operation on their minds, and they advised me on that evidence, I should not adopt their advice, but proceed on that only which was clear evidence. I know from experience how little weight these declarations have when the cause is heard, but, on principle, I cannot reject them.

I must now come to the second declaration: "That the said William Benson thereupon asked the second mate why he did not put his helm to starboard." This appears to stand in a different predicament; this is a declaration coming from one of the seamen. I mean to adhere to the rule I have laid down, that the declarations of seamen shall not be taken. If I did not adhere to it I should have them pleaded in all these cases months and weeks after the accident took place; that would increase the expense, and not facilitate justice to the parties.

Dr. Bayford. This ship was in charge of the second mate.

THE COURT. That did not escape me. I do not mean to take the evidence because the chief officer or the second mate was in charge; if I did, I should extend the principle unduly. The principle is, that the master must be the agent of the owners. (a) But it has been ingeniously argued by the learned counsel that it might be evidence to discredit the mate, if he makes an affidavit in opposition to it. That is perfectly true; it would be evidence to that effect if it were legitimately imported into the case; but I take it to be an inevitable consequence that where parties proceed on an act on petition they agree to forego the advantage of plea and proof; because, if not, and I were to allow this argument to prevail, they would put in the declarations of the master, and mate, and all the seamen; and, when it should be objected to as not admissible evidence, it would be said, we do not know what evidence may come from the mate and seamen, and, therefore, though it is not direct evidence, it may have the effect of discrediting some witnesses of whom I know nothing. It would lengthen our proceedings, and enhance the expense if I were to allow the statement to be received on that ground, and that ground only. I apprehend the party, in acceding to proceed by act on petition, has precluded himself from introducing it. Therefore that must be expunged.

With regard to the other declarations I need not make any observations. It is true they are conversations at a distant period, and they may have little effect on the case, but they fall within the principle of law which I have already stated, and I am not at liberty, however much I may be of opinion that they are of no value, to reject them. I must follow the principles of law, and admit what is admissible, and reject what is not.

Proctors for the "Orbona," *F. Clarkson*; for the "Actæon," *Jennings*.

(a) Declarations of the pilot in charge rejected in the "Lord Seaton," 9 Jur. 603.

THE "COSMOPOLITAN."

THIS was a cause of damage by plea and proof, brought by the "Princess Royal." A libel was given in on her behalf, pleading, *inter alia*, to the effect "that half an hour previous to the collision in question the 'Cosmopolitan' had run foul of a barge opposite Barking Creek, and that, on being threatened with legal proceedings, her owners had paid the damage."

Objection being taken to the article the Court directed it to be struck out.

1853.

THE
"ACTÆON."
Judgment.

The Court cannot admit such declarations for the purpose of merely discrediting the witness in case he should otherwise depose. By proceeding by act on petition, the parties mutually forego such advantages.

THE HIGH
COURT OF
ADMIRALTY.
Dec. 5.

1853.

THE HIGH
COURT OF
ADMIRALTY
Dec. 5.

A schooner, considerably damaged, her master being also confined to his bed, ill, was towed by a brig for fifteen or sixteen days, a distance of nearly 1000 miles. The property salvaged being about 3800*l.*, the Court awarded 800*l.*

Judgment.

THE "HARRIET."

SALVAGE suit. On the 3rd of May, 1853, the brig, "Sheraton Grange," in her voyage from Bahia to Falmouth, fell in with the schooner "Harriet," which, in her homeward voyage, had met with tempestuous weather, and sustained considerable damage, took her in tow for fourteen or fifteen days, and conducted her in safety to Plymouth, a distance, it was said, of about 1000 miles. During the time the master of the schooner was confined to his bed by illness.

Dr. *Addams* and Dr. *Twiss* appeared for the salvors; Dr. *Haggard* and Dr. *Platt* for the owners.

DR. LUSHINGTON. I am of opinion that a very valuable service has been rendered to the ship and cargo; that she was in great distress, both in consequence of the tempestuous weather, which had distasted her, and of the illness of her master. The vessel was taken in tow, and towed for fifteen or sixteen days; besides which the "Sheraton Grange" had been in attendance upon her three or four days more. I can hardly conceive that more essential service could be rendered by one vessel to another. I think the owners of the "Harriet" are indebted to the energy of the master of the "Sheraton Grange" for having performed this service.

The only question is, looking at the value of the ship and cargo, 3800*l.*, what is an adequate reward. I do not rely upon the affidavit made in the case as to all sorts of contingent profits and losses, but I give what I consider a fair and just remuneration,—namely, the sum of 800*l.*

Proctors for the salvors, *Addams*; for the "Harriet," *F. Clarkson*.

THE "EARL GREY."

THE HIGH
COURT OF
ADMIRALTY.

Dec. 5.

Proctors are not justified in entering actions and requiring bail to an amount quite disproportioned to the service.

Judgment.

THIS was a salvage suit, in which, upon a value of 13,100*l.*, the Court allotted the sum of 100*l.*, and made the following remarks upon entering actions, and taking bail in too large an amount:—

DR. LUSHINGTON said: The Court is desirous of entertaining a hope that the proctor who conducted this case on behalf of the salvors, must have been greatly misled by his party in the course of these proceedings; for I find there is first an action entered in the sum of 2000*l.* against the ship and freight,

and bail to answer it was given to that amount. Another action was then entered against the cargo in the sum of 2000*l*.

Now, it does appear to me that it is exceedingly unjustifiable that, in a suit of this description, actions should be entered at such enormous sums, and that such large bail should be required; because, though it may happen in this individual case, and in many others, that the bail is given with great facility, yet it may arise in other cases, and especially where foreigners are concerned, that the demand for such bail is attended with great inconvenience, and often with great expense to those who give it. I think the Court is bound to mark its disapprobation of proceedings so recklessly conducted.

1853.

THE
"EARL GREY."
Judgment.

THE "JAN HENDRIK."

THIS was a cause of salvage, promoted by the owners and crews of two luggers, to obtain compensation for services rendered to the Dutch ship "Jan Hendrik," in the month of June, 1853.

She was on a voyage from the island of Java to Amsterdam, laden with a cargo of coffee, sugar, rattans, &c., when she got upon the Goodwin Sands, on the 28th June. She suffered considerable damage; and then came off into deep water. The two luggers, "Stornaway" and "England's Glory," came to her assistance, and brought her in safety to the North Foreland, where they engaged two steamers to tow her to Sheerness. The value of the ship and cargo was about 13,400*l*.

Dr. *Addams* and Dr. *Twiss* appeared for the salvors; Dr. *Haggard* and Dr. *Robinson*, for the owners.

DR. LUSHINGTON. If the defence of the owners was to be received, as to an alleged agreement, which is said to have been made, and which has been partly brought under the notice of the Court, in an act on petition, but which has been more particularly introduced in evidence, it would be no defence at all. I thought the principle was so well established, and had been so regularly acted upon from the time of my predecessors, that I should not at this day have heard an argument as to a proffered agreement, which agreement was not carried into effect between the parties. The principle has always been this: if there has been an agreement made between the salvors and the owners, whatever may be the consequence, whether the service is attended with great risk and danger or not, both parties must

THE HIGH
COURT OF
ADMIRALTY.

Dec. 7.

A Dutch ship, valued, with her cargo, at 13,400*l*, having struck on the Goodwin Sands, but got off into deep water with the loss of her rudder and other damage, was taken by two luggers to the North Foreland, where steamers were engaged to tow her to Sheerness; fourteen of the luggers' crews remaining on board to pump her. The Court awarded 400*l*, besides the hire of the steamers.

Judgment.

An agreement once made, must be adhered to, whatever may be the consequent disadvantage to either party; but a proposal made by one party and re-

1853.

THE "JAN
HENDRIK."*Judgment.*

jected by the other, cannot influence the judgment of the Court, which must be guided solely by the evidence.

The circumstances of the case.

The "Jan Hendrik" gets upon the Goodwin Sands, strikes heavily for about an hour, and then comes off.

No signal of distress was exhibited, probably because of the haziness of the weather; but

she had lost her rudder, some sails, one of her boats, and two of her crew; and though alleged that she might have steered herself to a place of safety with her sails,

be bound to abide by it. But if an agreement is not made, or if, after it is made, it is repudiated by the owners, then it is always considered as if no agreement at all had been entered into, and as if the proposition made by the salvors, or which originated with the owners, had never been proposed at all. It has never been considered, in this Court, that a proposition so made was any guide for its judgment, because it is one thing to take a lump sum when the labour and the risk are uncertain, and another thing when such proposition has been rejected, to argue that it ought to have an effect on the judgment of the Court.

Now, what are the circumstances of this case? — for it is by the circumstances now given in evidence that my judgment and discretion must be governed in the amount of remuneration. Here is a large vessel, of the burthen of 614 tons, laden with a valuable cargo of sugar, and the whole of the property alleged to have been salvaged amounts altogether to 13,000*l*. On the morning of the 28th of June, — the precise moment does not appear to be of any importance, and if it were, it is not easy to fix it, — this vessel, with the wind from the W.S.W., in consequence, as it is stated, of an unusually powerful current, the weather being, according to the representation of the owners, hazy and misty, — for both these statements are made — comes to the ground on the Goodwin Sands. According to the same representation, she at times strikes heavily; but the extent of damage which was done it was utterly impossible for those on board to know; but after having so struck for the period of an hour, according to her own representation also, she comes off.

Now, what was her state and condition after she came off, and when the "Stornaway" came to her assistance? It is said that there was no signal of distress, and that is perfectly true; but whether, looking at the representation made as to the haziness and mistiness of the weather, that arose from its being supposed that it would be impossible that a signal could be seen, or not, in point of fact, no signal was made. But, now, what was her condition? According to her statement, the rudder was gone, part of the sails were gone, one of the boats was gone, one appears to have been damaged, and two of the crew were gone. It is alleged that at this time she might have protected herself, and secured her own safety; — that by the aid of the sails the ship could have been steered. Now, I take it to be true that, in fine weather, with the wind behind a vessel, it is possible to steer her for a certain given length of time with the aid and assistance of her sails; but I take it not to be true that a vessel could be moved in one direction or another, or come

near the wind, when she is in that state; and I take it to be absolutely impossible that this vessel could have gone to Sheerness, or to any place of safety, north or south, by her own exertions alone; and I think so for an obvious reason, which I am presently about to state.

The services of a person of the name of Axon, who comes with the "Stornaway" about 4 o'clock in the morning, are accepted. Whatever might be his opinion as to the probability of saving the vessel, I take it that he was not capable of forming any distinct or clear opinion at all, because, he must have been, like all the rest, in perfect ignorance of the damage done to her bottom. He comes up, and the master of the vessel, as it is admitted on all hands, puts him in charge to carry her to a port of safety. Before he has it in his power to do much, there comes up the other lugger, named the "England's Glory," and they contrive, as I think, with no small difficulty, to conduct this vessel to the North Foreland, and there they fall in with two steamers, of which I am about to speak. Whether it occupied three or four, or five or six hours, appears to me of very little importance; but I consider it to be a matter of the greatest importance that the vessel was so conducted to the place to which she was brought, — a place where there was a chance of meeting with the effectual assistance rendered by a steam-vessel. Then there are three steam-vessels make their appearance. It happens to be Midsummer, undoubtedly a favourable period of the year to obtain assistance of that description. It is stated, I doubt not with perfect truth, that the "Copeland" and the "Britannia" accepted an offer of 35*l*. each for the purpose of conducting her to Sheerness, because they were afraid of the competition of another; and I take it to be, from my experience, equally true, that if there had been only one steam-vessel, they would have found it difficult to make a bargain with the steamer at all. The probable consequence was, that no bargain would have been received, and the result would have been a suit in the Admiralty Court. Such is almost the universal course with which these matters have been conducted with reference to steamers rendering aid to vessels in distress.

However, by the aid of the steam-tugs she is carried to Sheerness, and when she arrives, having had fourteen of the crews of the two luggers on board assisting in pumping, and the hawsers having broken twice, she had nine feet of water in her. I should like to form a conjecture as to how many feet there would have been in her, if neither the "Stornaway" nor the "England's Glory" had come up, and she had gone into

1853.

THE "JAN
HENDRIK."*Judgment.*

yet, under the circumstances, this seems impossible.

The services of the "Stornaway" were accepted, about 4 o'clock, A.M., to conduct her to a port of safety.

Another lugger comes to their assistance, and they succeed in taking the vessel to the North Foreland.

Whatever may have been the time occupied, the service was of the greatest importance.

Two steamers were then engaged to tow her to Sheerness;

where she arrives in safety, but has nine feet of water in her, though fourteen of the luggers' crews continued on board pumping her.

1853.

THE "JAN
HENDRIK."*Judgment.*

The charge of the vessel had been given up to a person named Axon, who made an agreement with the steamers, but that fact affords no argument that any agreement had been made with him.

The service was very meritorious, and required skill, though there was no risk of life.

Value of the property being 13,400*l.*, Court awards 400*l.*, besides the hire of the steamers.

the North Sea with two of her own crew deficient. I take it to be perfectly clear, that she would have been in most imminent danger.

The service has been performed, and now the consideration is, what ought the Court to allow? It is admitted, as I have said, that the charge was given up to Axon, and, to my astonishment, it has been argued that, because he made an agreement with the two steam-tugs, there must have been an agreement with him. It is every day's practice—perhaps not a wise one—that when salvors are put in charge of a vessel, or when they assert it, they are accustomed to pay auxiliary aid; and they do it for the very purpose of alleging that they had the charge and control of the whole matter. But here it is admitted that Axon had the control, and it was a part of his duty to make the best bargain he could for the owners. The Court has to consider what ought to be paid by the owners, or, in 99 cases out of 100, by the underwriters. The value of the property, in the state in which it was found, was 13,400*l.* I am of opinion that it is a very meritorious service, because of the danger to the ship and cargo. There was no risk of life to the salvors, but there was the exercise of skill, for which the Deal boatmen are so well known and celebrated. The service did not last many hours. I am of opinion that the underwriters ought to be thankful to pay the sum I am now about to allot, which is 400*l.*, and they must also pay for the hire of the steamers.

Proctors for the salvors, *Rothery*; for the owners, *Toller*.

THE HIGH
COURT OF
ADMIRALTY.

Dec. 7.

The Court will not receive as evidence the affidavits of persons, professing to be skilled in nautical affairs, as to their opinion upon any case.

THE "NO."

SALVAGE suit. In the course of the judgment the Court (*Dr. Lushington*) thus remarked upon one of the affidavits: "The affidavit marked A. is not evidence in this case, and I am rather surprised to see it introduced. It is made by two persons, who state themselves to be well skilled in nautical matters, and they are pleased to condescend to favour the Court with their opinion of the facilities and difficulties of the case. It has been an universal rule not to receive these affidavits; for were they to be received, the inevitable consequence would be this: the Court would be inundated with the opinions of nautical men on the one side and opposite opinions on the other, to the great expense of suitors and great delay in the hearing of the cause, and with no benefit whatever. Therefore I disclaim paying any attention whatever to that affidavit."

THE "NORDEN."

SALVAGE suit. The vessel got upon the Mouse Sand, from which position she was extricated by means of a steamer, four fishing-smacks, and two watermen, who instituted proceedings.

DR. LUSHINGTON, in the course of the judgment of the Court, observed: "I entirely agree with the argument that the principal salvor is the steamer, but I disagree with the argument that the owners of the smacks had no right to sue; because I take it, that if you employ the masters of the smacks and part of the crews to perform salvage services, of necessity you take into your employ the vessels which brought them, and which remain to carry them back. I admit there is a distinction, when you employ a smack in a service which is dangerous to herself, and when the probability is, that she may be stove in; but as far as relates to her detention, and the right of the owner to be paid for the loss of her time, it is the same thing. The services of the smacksmen were short in their duration, but without them, it is impossible to predicate that the vessel could have been got off the Sand.

1853.

THE HIGH COURT OF ADMIRALTY.

Dec. 13.

When smacks men are employed in a salvage service, the owners of the smacks have a right to sue for remuneration for the detention, even when the service is not dangerous.

Judgment.

THE "TOIVO."—*Motion.*

THE HIGH COURT OF ADMIRALTY.

Dec. 14.

WHILE this vessel was lying at Malta, in the month of February, 1853, her master borrowed 900*l.*, for which he gave a bottomry bond. In August she was at Uleaborg, in the prosecution of her voyage from Limerick to that port, and thence to Hull. While she was at Uleaborg proceedings were instituted for the recovery of the bond, but the then master, who had succeeded the master who gave the bond at Malta, himself requiring money for wages, necessaries, &c., borrowed an additional sum of 226*l.* 0*s.* 9*d.*, and gave a new bond for the two sums together, with interest at 6 per cent.; the holders being at the same time invested with power to insure the vessel and freight on account of the owners, and at their expense.

A bottomry bond having been given, it is allowable to pay that, and to include the amount in a fresh bond during the same voyage, but not in a subsequent one.

Dr. Addams, on a previous day, moved the Court to pronounce for the validity of the bond, when the Court desired to give the question some consideration.

DR LUSHINGTON. I have considered this case, and on the assumption of *bona fides* on the part of those who advanced

Judgment.

1853.

THE
"TOIVO."
Judgment.

their money. I have had very great anxiety to uphold the bond; at the same time, it is quite obvious that it is my duty not to extend the jurisdiction which is conferred upon me, and not to give to a bond, which is not properly to be considered a bottomry bond, that denomination, or that effect.

On a former occasion I expressed an opinion, to which, upon consideration, I intend to adhere,—that if a bottomry bond was given upon the same voyage it would be consistent with the law of bottomry to allow that to be paid, and a fresh bond to be given to the amount; but I do not think that these Courts have ever gone the length of saying, that where a bottomry bond had been given *on a previous voyage* that could be done.

There are items, also, in this bond which are not properly the subjects of a bottomry bond, and which tend to show that the transaction was one of mortgage, and not bottomry. I regret to say that, having looked at the case carefully, it is not in my power to accede to the prayer, and to pronounce for the validity of the bond. I have no jurisdiction if it is a mortgage.

Proctor, Coote.

THE HIGH
COURT OF
ADMIRALTY.

Dec. 14.

A vessel, with the wind free, meeting another close hauled on the larboard tack, having ported her helm and come into collision: *Held*, to blame; the Elder Brethren being of opinion that the captain gave the order heedlessly, and without looking at the position of the other vessel.

Summing-up.

Circumstances of the case.

THE "SEA PARK."

THE "Hendrika," a barque of 678 tons, bound from London to Port Philip, and the "Sea Park," a vessel of 835 tons, proceeding from Ceylon to London, came into collision off Dungeness, about 12.30 A.M., on the 13th of September, 1853.

The respective cases are stated sufficiently in the judgment.

Dr. *Addams* and Dr. *Twiss* appeared for the "Hendrika"; Dr. *Haggard* and Dr. *Bayford* for the "Sea Park."

DR. LUSHINGTON, addressing the Elder Brethren (a), said, Gentlemen, it appears to me the "Hendrika" was bound from London to Australia; that on the 13th of September she was in the neighbourhood of Dungeness; the wind, as she represents, was S. by W.; she was on the larboard tack, close hauled. You, of course, are fully aware what would be her proper course.

The night appears to have been clear, although it is represented, to a certain extent, as hazy, but vessels could see each other at a reasonable distance. She says that she saw the "Sea Park" ported, and ran into her. I apprehend it is intended, on

(a) Capt. Farquharson and Capt. Wera.

the part of the "Hendrika," to attribute the blame to the "Sea Park" in one of these two particulars,—either that she ought to have kept her course, and done nothing; or, if she ported at all, she ought to have done so sooner, so as to have escaped the collision.

The case of the "Sea Park" is, that she was coming home from Ceylon to London, steering E. N. E. towards Dungeness to get a pilot; and she represents that the wind was S. by E., so that there is a difference of two points between the statement on the one side and on the other. I am not aware that that makes any difference. She says she saw the "Hendrika" a mile off; that she carried a light on the port cat-head; the "Hendrika" was seen a point on her lee bow, and that she immediately ported. It was said, by Dr. Bayford, that when the two vessels became visible to each other, they were in one and the same direction, but, I apprehend, that is not strictly correct. The "Sea Park" says, that in consequence of having so ported her helm, her head was brought to the E. S. E.; and then she alleges that the "Hendrika" suddenly starboarded her helm, and brought about the collision.

It has been observed, and I think with good reason, that it is somewhat singular this charge should not have been included in the protest: whether there is any importance in it I must leave to your determination.

The questions we shall have to determine are these: First, whether the "Sea Park" was right in porting her helm at all? Secondly, whether, if it was right, she should not have ported sooner? and whether, if there had been a good look-out, she would not have perceived the "Hendrika" in time to adopt those measures fitting to be adopted in order to avoid the collision, if possible? It is manifest that, if the "Hendrika" starboarded her helm, she was to blame; and you will take into consideration whether there is any evidence to establish the fact. It is sworn to by several persons on board the "Sea Park," and contradicted in positive terms by those on board the "Hendrika."

CAPTAIN FARQUHARSON. We are of opinion that the "Sea Park" was totally to blame. The captain, the moment he heard that there was a vessel a-head, without looking whether she was right a-head or on her bow, put the helm hard to port. Had the "Hendrika" starboarded her helm, her sails would have come aback, which does not appear to have been the case. She would have been rather paying off, and going on the other tack, if she had starboarded as soon as the "Sea Park" states

1853.
THE
"SEA PARK."
Summing-up.

The protest of the "Sea Park" differs from her case against the "Hendrika."

Question 1.
Was the "Sea Park" right in porting?
2. If yea, should she not have done so sooner?

If the "Hendrika" starboarded, she was clearly to blame.

Opinion.
"Sea Park" solely to blame.

1853.

THE
"SEA PARK."

she did. Had the "Sea Park" kept her course she would have gone clear. The "Sea Park" was solely to blame.

THE COURT pronounced against her.

Proctors for the "Hendrika," *Rothery*; for the "Sea Park," *Deacon*.

THE HIGH
COURT OF
ADMIRALTY.

Dec. 20.

A vessel having taken fire from spontaneous combustion of the cargo, came to anchor, in a calm, about eight miles off Monte Video; at the request of her master, the commander of a government steam-tug went to her assistance, and towed her to the harbour, at the entrance of which, however, both vessels grounded on a rock. She was got off by other assistance, and was then unladen by the crew of the steam-tug. The service continued about twenty days. Defence set up that, by the heedlessness of the salvors, the vessel grounded and suffered more harm than their services did good, not sustained. On the value of 8800*l*, the Court awarded 750*l*.

THE "ROSALIE."

THIS was a suit for salvage, brought by the commander, officers, and crew of her Majesty's steam-tug "Locust."

The "Rosalie," a barque of 230 tons burthen, left Monte Video bound for Liverpool, on the 20th March, with a cargo of tallow, hides, bones, &c., and was two days afterwards discovered to be on fire, as supposed, from spontaneous combustion. She put back, and on the 25th March came to anchor seven or eight miles from Monte Video. The master immediately made an application to the consul, and from him obtained an introduction to Lieutenant Day, the commander of the "Locust." It appears that Lieutenant Day at first declined proceeding to the barque without a pilot, as he considered the navigation too difficult for him to undertake upon his own responsibility; but he afterwards assented, went to her assistance, and took her in tow with the intention of putting her on shore at the fort of San José, but unfortunately both vessels grounded on the rocks at the entrance of the harbour. A Brazilian steamer came to their assistance, and after some hours succeeded in getting them off. The crew of the "Locust," consisting of fifty-five men, including the officers, then assisted in extinguishing the fire and in removing the cargo, a service which they represented to be, from the nature of the materials, of the most difficult and repulsive character. They were occupied at various times for about twenty days between the 25th of March and the 30th of April. The value of the property saved was about 8800*l*, exclusive of some specie which had been removed, and could not be identified.

No tender being made, the action was brought against the owners, who defended it chiefly on the ground that whatever service may have been rendered, the parties proceeding had forfeited their title to remuneration, inasmuch as they had heedlessly drawn the barque upon the rocks, whereby she had sustained damage to the amount of 500*l*.

Dr. *Addams* and Dr. *Bayford* appeared for the salvors; Dr. *Haggard* and Dr. *Twiss* for the owners.

DR. LUSHINGTON. This is a demand made by Lieutenant Day, on behalf of himself, the officers, and crew of her Majesty's vessel, the "Locust," consisting altogether of fifty-five persons, against this ship, the "Rosalie," for salvage reward for services alleged by him to have been rendered to her. Before I advert to the particular facts and circumstances of this case, I will observe that I do certainly rejoice the ancient law and practice of this Court has not been altered. Whatever may be the merits or demerits in this particular instance, I think that, continuing to allow her Majesty's officers and those under their command, to obtain a reward where they do render beneficial services, frequently at great risk and peril, and sometimes where the commander incurs great responsibility, is not merely an act of justice, but most advantageous to the mercantile marine of this country. Say what you will, so long as human motives operate on conduct, unless you give a reward, you must take away all incitement to service. It is all very well to talk of the abstract question of fulfilling duty and obeying commands; and I have no doubt that, so long as men can execute the duty and perform the commands entrusted to them, they will do so; but in cases of doubt and difficulty, and where great and extraordinary exertions have to be made, reward according to human exertions is the only great stimulus to their performance.

1853.
THE
"ROSALIE."
Judgment.

It is advantageous to the mercantile marine that her Majesty's officers should be allowed to obtain reward for salvage services.

The parties promoting this suit are Lieutenant Day, and those on board the "Locust." Of course he could make no claim for the service of the steamer herself—she is the property of the Government; and though he would be responsible for any damage which improperly occurred, he would be answerable for nothing else. It is impossible for him to advance any demand at all like that of the owners of steam or other vessels who have risked their property in order to render assistance to others. I cannot take into account the specie that was on board the vessel, and which had been removed.

No claim can be made for the services of a vessel belonging to Government.

I will commence my observations first, from the "Locust" going out for the purpose of rendering assistance. It was in consequence of a letter which was produced to Lieutenant Day, coming from the British consul. That letter stated that the "Rosalie" was on fire, and was becalmed. On that representation Lieutenant Day was justified in acting without reference to the other circumstances of the case. This vessel left Monte Video on the 20th March, and when about 250 miles from land, the fire broke out, and every endeavour made to extinguish it failed. Preparations were made to leave the ship in case of absolute necessity. The course of the vessel was changed, and fortunately, the wind became favourable, which enabled her to

Facts of the case.

1853.

THE
"ROSALIE."
Judgment.

reach the land in a shorter time than she otherwise would have done. Captain May, finding the situation in which the ship was placed, took the wisest step he could adopt; namely, to proceed to Monte Video with the greatest possible expedition, for the purpose of obtaining assistance; that being the readiest means to bring her into a state of safety, to get the fire extinguished, and the cargo, so far as was necessary, unladen. On the afternoon of the 25th March, Lieutenant Day lent a favourable ear to the representation made by Captain May, and in the letter of the consul; he was ready to render assistance, but he felt one difficulty, namely, he did not know the navigation of the river sufficiently to enable him to do so, and he was satisfied there would be great difficulty in obtaining a pilot, because it was a festal day. He says he was reluctant to go without a pilot, and I believe that for two reasons; first, he states to the admiral that its being a festal day was the reason why he ventured without one; and, secondly, I believe that officers in her Majesty's service are so afraid of the responsibility imposed upon them, and to which they may be exposed, that they are always anxious to take a pilot whenever they can. However, there was no time to be lost; the exigency was great. We must recollect that, when the ship was on fire, no man could calculate whether it would continue in a smothered state, or whether it would break out, and compel the persons on board to quit for the protection of their lives.

The vessel was
in great
danger.

Charge against
Lieutenant
Day rebutted.

Now commences the first charge against Lieutenant Day. It is sworn by Captain May, that he made an offer of a pilot to be put on board the steamer, to which the answer of Lieutenant Day was, that he was in charge of the barque and he wanted no pilot. This is denied on the part of Lieutenant Day. Am I to believe all that Captain May has sworn? I should be inclined to give him infinitely greater credit, if it had not been for the mode in which he has expressed himself throughout this affidavit. When I find a person swearing as he has done, not contenting himself with the contradiction of the parties, but imputing to others that they have been guilty of the grossest perjury, and using the expression, over and over again, of "pure invention," I must entirely agree with the ancient expression of Lord *Stowell*, "The very strength of the affidavit renders me less credulous of its contents." I cannot take the *ipse dixit* of Captain May, that such a proposition was made, nor am I prepared to say, if it had, what would have been the consequence of accepting it, or whether there was blame in refusing it. It appears to me that the proper place for the pilot is, where he is to navigate, and that it was not the

Sometimes the
very strength
of an affidavit
renders the
Court less cre-
dulous of its
contents.

Lieutenant
Day was right
in taking the

proper place to go on board the steamer. They then proceed towards the port of Monte Video, and it does not appear to me that the slightest objection was taken by any person on board the "Rosalie" to the course steered by Lieutenant Day. I cannot but think that, if there had been any glaringly wrong course pursued, it would have been natural for those on board the "Rosalie," particularly the pilot, to give some warning; but I do not rely on that circumstance. I now come to the fact that both these vessels got aground; and, first, with respect to the place itself; secondly, the degree of blame, if any, attaching to it; and, thirdly, the consequence. I cannot think it was a place of that safety which it is represented to be by Lieutenant Day, and those who were with him; and for this reason: I find Admiral Henderson represents it to be a place of considerable danger, and I am bound to give him credit; first, because he is best acquainted with the locality; and, secondly, because he is disinterested. The barque remains aground for some time—no matter whether it is fourteen or sixteen hours. Does any blame attach to Lieutenant Day on that account? It is represented as having been a heedless act. Heedlessness must mean a want of care—a disregard to the circumstances of the case, so as not to have exercised sufficient caution when he could so have done. Now, I do not attribute to Lieutenant Day that there was anything heedless in his conduct, but I do apprehend that there was on his part a want of adequate knowledge of the entrance to the harbour; and, to a certain extent, he must be pecuniarily responsible for this matter, because it diminishes the success of the service he was performing. Accidentally coming on shore exposed the vessel and cargo to some risk. However good his intentions—however laudable his wishes, he certainly failed in the performance of that service which might have been performed with greater celerity had he been possessed of greater knowledge, or had he resorted to other assistance.

I next look to see how the vessel was rescued from her situation, and here I think neither account is consistent with the truth. Indeed, in nearly every case, it almost uniformly happens that the truth lies between the two statements. On the one hand, it is said that this was done exclusively by the aid received from a Brazilian steamer and from French and merchant vessels, without any reference to the "Locust"; on the other hand, it was said that it was done under the direction of Lieutenant Day; and he, in fact, was not only the principal actor, but he was the principal director of all that occurred. The truth lies between the two. I think some assistance was rendered by Lieutenant Day, but I think the greater part of the

1858.

THE
"ROSALIE."
Judgment.

vessel to
Monte Video,

and was not
guilty of heed-
lessness, but of
ignorance of
the locality in
getting
aground;

whereby his
services were
rendered less
efficient than
they might
otherwise have
been.

The barque is
got off, partly
by the as-
sistance of
Lieutenant
Day, and
partly by
foreign aid.

1853.

THE
"ROSALIE."
Judgment.

The objection that the unloading of the cargo was not a salvage service, but a service on shore, over which the Court of Admiralty has no jurisdiction, cannot, for various reasons, be allowed.

exertions made to get her off are to be attributed to other assistance. However, the vessel is eventually got off, and conducted into the harbour, where her cargo is unladen.

And now has arisen, by the ingenuity of counsel, what I certainly did not expect to find on the present occasion,—a new point of law. It is said that this was not continued assistance, but assistance rendered on shore, over which the Admiralty Court is not to exercise any control in the nature of salvage service. But the first question which I should naturally put to myself is,—if this be so, if I am to acknowledge myself bound hand and foot, and totally helpless to do justice on the present occasion, who is to do it?

If I were in difficulty I should adopt the Common Law principle, and not throw off the jurisdiction, unless there was another to take cognizance of the case. But I am in no difficulty. I am of opinion that it was a continuous service, and, moreover, a salvage service. I think it was continuous for this reason: it was not broken off upon the vessel being aground for a certain period, because Lieut. Day still continued doing something; the vessel was in his charge, and he was responsible for every act done. I think it would be injurious to the course of justice, in these cases, if I were ever astute in severing services at sea and on land. When a vessel has been driven on shore, and part of the services were performed when the waves beat over her, and part when she was lying dry, it has been said that the latter was a land service, and the Court of Admiralty had nothing to do with it; but Lord *Stowell* would not submit to it: he said it was part of a whole.

The nature of the service performed.

With regard to the nature of the service performed, and the extinguishing of the fire, so far as the use of the pumps belonging to the "*Locust*," and instruments, is concerned, Lieutenant Day can demand nothing; but, so far as the labour of himself and his men extends, he is fully entitled to be compensated according to the degree of labour and of skill, if skill was used.

I next come to the unlading of the cargo; and here I think that very great hardships were endured by the persons who composed the crew of the "*Locust*." I think they did persevere, at the risk of their health and almost of their lives, to perform a service which—though I may be told that persons might have been hired at Monte Video to perform—I believe never would have been done with the expedition of British sailors. I think I am bound in law, as well as in justice, to reward them for the sufferings they underwent, and the damage they sustained in the loss of their clothes.

In estimating the salvage, I am bound to bear in mind that,

when the barque was first taken in tow, she was in great peril. With regard to the extent of damage which occurred in consequence of the vessel taking the ground, I am of opinion that it is impossible, with the materials before me, to ascertain it with anything like accuracy. I think she touched the ground on the middle, and that a certain quantity of the keel received injury. I take that into consideration in the amount of salvage to be awarded. Considering what will be a just and proper reward according to all the circumstances, and knowing that quantum is a matter respecting which people will entertain different opinions, I think I shall not give too much when I allot the sum of 750*l*.

Proctors for the salvors, *Rothery*; for the owners, *F. Clarkson*, who asserted an appeal.

1853.
THE
"ROSALIE."

WEATHERLEY *against* WEATHERLEY.

On admission of the libel.

CONSISTORY
COURT OF
LONDON.

March 9. 1854.

THIS was a suit for divorce by reason of adultery brought by the wife against the husband, a pauper.

The marriage took place on the 6th of March, 1853.

The libel on behalf of the wife pleaded in the

4th article. *That* some time in or about October, 1852, Charles Weatherley, the husband, took into his service, as shopwoman, to assist him in his business of confectioner, a female named Elizabeth Eastey, with whom he soon afterwards commenced, and thenceforward up to the period of the date of the libel, continued to carry on an illicit intercourse; *that* during such period great personal familiarities were frequently observed to pass between them in his said house; *that* he was in the constant habit of kissing her, of placing his arms around her neck and waist, and of causing or allowing her to sit upon his knee, and take indecent liberties with his person; *that* they were in the habit, during the day, of passing much time together upstairs in her bedroom, and of sitting together to a late hour at night; and *that* at such times they had the repeated carnal use and knowledge of each other's bodies.

In a suit for divorce, on the ground of adultery, it is allowable to plead undue familiarity and illicit intercourse antecedent to marriage, when the adultery is charged to have been committed, with the same person as the ante-nuptial incontinence.

Pleading.

5th article. *That* upon an occasion happening towards the end of January, 1853, the said E. E., at a late hour of the night, ran upstairs into her bedroom, in which H. M. (a female in the service of the said C. W.) was then in bed, and was im-

1854.

WEATHERLEY
against
WEATHERLEY.
Pleadings.

mediately followed by C. W., who placed his arms around her neck or waist; whereupon she remarked, that if he would not leave the room she should undress and go to bed; to which C. W. replied, "It would not be the first time I have seen you undressed;" and then left the room.

6th article. *That* on a day early in February, 1853, soon after the said H. M. had quitted the said bedroom in the morning, C. W. proceeded there, and lay for some time in one and the same bed with the said E. E., who was lying undressed therein, and had the carnal use and knowledge of her body.

7th article. *That* upon a Tuesday afternoon, about three weeks before the marriage of the parties in the cause, the said C. W., having directed the said H. M., who was at the time engaged in washing, to take charge of the shop, proceeded up stairs, in company with E. E., to her bedroom, and then and there lay with her for a considerable time on the bed, and had, &c.

8th article. *That* very shortly after the marriage of the parties in this cause C. W. evinced great coldness and indifference towards his wife; and, on several occasions during the second week, while they were in lodgings at Peckham, omitted to return to her at night; and passed such nights at his own house, in Bolingbroke Row, Walworth Road, where the said E. E. was still residing.

In other articles various acts of adultery were charged. The admission of the libel was opposed.

Dr. *Dasent* (counsel assigned) appeared in opposition to the libel; Dr. *R. Phillimore* in support of it.

March 9.
Judgment.

DR. LUSHINGTON. The circumstances of this case are these:—This is a suit for divorce, brought by the wife against the husband: the marriage took place in March, 1853. A libel is given in on behalf of the wife; in which she pleads a criminal connection with a person named Elizabeth Eastey, both before and after the marriage.

[THE COURT having stated the substance of the 4th, 5th, 6th, 7th, and 8th articles, then proceeded:—]

The objection has been, very properly, taken to the pleading incontinence previous to the marriage. No doubt, as a general rule, it is not competent to the husband or the wife to plead illicit intercourse prior to the marriage; because the doctrine universally maintained is, that marriage operates as an oblivion of all that has passed, and as oblivion of all that can possibly have occurred.

This is the rule; and it is set forth in a case quoted at the

General rule
that marriage
operates as an
oblivion of the
past, and that
ante-nuptial
incontinence
cannot be
pleaded.

bar, *Perrin v. Perrin* (a), and enforced there with considerable strictness. I had occasion to refer to it, also, in the case of *Lord and Lady Graves*. (b)

But the question which I have now to decide is, whether the special facts of this case do not make it an exception to the rule. The first fact to be noticed is, that the woman, with whom connection is pleaded before marriage, is continued in the service of the husband after marriage. The next fact is, that the adultery is charged to have taken place with this very same person. It appears to me that this circumstance does form a necessary exception to the rule, and one which I am bound to engraft upon it, and for a very obvious reason; because circumstances, which may be proved subsequently to the marriage, will have a very different complexion, whether they are taken standing alone, without reference to preceding circumstances, or whether they are taken in conjunction with antecedent criminal connection itself. If I were to confine the wife in this case to pleading the adultery simply after the marriage, it might appear, in the evidence, that this was a woman in the employment of the husband, the party proceeded against, and on frequent occasions he necessarily would have to meet her in various parts of the house in discharge of her usual vocation; and many circumstances might occur which, if no explanation was given of them, might be construed to be circumstances imputing no guilt at all; but which, if taken in connection with former intimacy, and all that occurred on that occasion, would necessarily bear another and a very different construction.

It would follow, therefore, that acts, themselves of a doubtful character, might, according to other facts and other circumstances, bear a different construction and a different interpretation, if there was a connection before the marriage. The very fact, for instance, of the husband continuing this woman in his service, would put a very different complexion on the case from what it would if she had simply lived with him at their marriage, and after the marriage had continued to be in his service. It appears to me, therefore, that it would be contrary to all

1854.

WEATHERLEY
against
WEATHERLEY.

Judgment.

There may be exceptions to the rule, particularly when the person with whom ante-nuptial connection is charged is continued in the service of the husband after marriage; and is, moreover, the person with whom he is charged with committing adultery.

The antecedent circumstances elucidate subsequent acts,

and thereby acts taken *per se* of a doubtful character assume a very different complexion.

(a) 1 Add. 3. in which case Sir *John Nicholl* seems to recognise the distinction made in the present case. He says, "The objections to the admission of this libel are confined to the 4th article, which pleads the incontinence of the wife with two persons, *neither of whom is an alleged adulterer in the cause*, prior to the celebration of the marriage." And he further suggests that "if the wife

should set up a case of desertion by the husband without any provocation on her part, her ante-nuptial misconduct might be fairly pleaded in his justification; and that possibly it might be fairly pleaded too by the husband, responsively to the wife's libel in a suit for restitution of conjugal rights."

(b) 3 Curt. 238.

1854.

WEATHERLEY
against
WEATHERLEY.
Judgment.

proceedings of justice to exclude the wife from the benefit of the exception. But there is a case where this occurred which occupied the attention of the Court for a considerable time, and in which, I think, with great wisdom, the objection was not taken. I allude to the case of *Simmons v. Simmons*: it was expressly pleaded there, in the additional articles, that Mr. Simmons had had criminal connection with Lucy Peacock before the marriage; that he had had a child by her; that after the marriage he had corresponded with her father, and supplied him with money to pay for the child, and also visited her at her father's house, and met her by appointment at other places; and then the article went on to allege adultery.

Dr. *Addams*. I was counsel in that case, and I did not take the objection.

DR. LUSHINGTON. Certainly not; but what would have been the position if the Court had excluded it? It was simply a question of whether he committed adultery with Lucy Peacock, and we should have had nothing to decide the case, but that this man saw this woman at her mother's house on certain occasions, and whether there was the least chance of a criminal communication between them would have been left in the dark. It appears to me that where the adultery is pleaded to have taken place with the same person with whom there was a criminal connection antecedently, and where marriage took place subsequently, it forms an exception to the general rule; and I shall, therefore, admit the libel as it stands.

Proctors for the wife, *Currey*; for the husband (assigned by the Court), *Loveday*.

CONSISTORY
COURT OF
LONDON.

Jan. 25.

Various acts, not singly or by themselves amounting to acts of cruelty, to justify a sentence of divorce, taken together, and considered with reference to the proved habits of intoxication of the husband, held sufficient to justify such sentence.
The wilful

CHESNUTT *against* CHESNUTT.

THIS was a suit for restitution of conjugal rights, brought by the Rev. Gilbert Chesnutt against his wife, Elizabeth Chesnutt. She pleaded cruelty and adultery, in bar. The case was argued in 1849, but the Court purposely delayed giving judgment in the hope that it might never be called upon to do so. Both parties appeared *in formâ pauperis*, but Mrs. Chesnutt, as it was understood, having lately come into the possession of 5000*l.*, under the will of her father, the Court was called upon to deliver judgment.

DR. LUSHINGTON. This is a suit for the restitution of conjugal rights, brought by the Rev. Gilbert Chesnutt against his

wife, Elizabeth Chesnutt. The libel is in the usual form, and alleges a marriage between the parties on the 4th December, 1832. It appears from the allegation of faculties, and the answers thereto, that Mr. Chesnutt received with his wife a considerable fortune, but from causes which are not stated, and into which it is not necessary to inquire, he took the benefit of the Insolvent Act, in November, 1847. The parties separated on the 25th March, 1848, and since that time Mrs. Chesnutt has been maintained by her father.

A very long period of time has elapsed since the case was heard, and I certainly entertained hopes that the Court might not be called upon to deliver any judgment. Whatever motives might have led to the institution of the suit, I certainly did think that there were circumstances developed in its progress, which might induce both parties to avoid further publicity. What those circumstances are, will appear presently. However, I have lately been called upon to deliver judgment, and it, of course, becomes my duty to do so, and I have taken this the first opportunity which presented itself since the wish of one of the parties was intimated to me.

Mrs. Chesnutt refuses to return to cohabitation, and, as a bar to the prayer of her husband, has given in an allegation charging him with cruelty and adultery. There has been no responsive plea; the case, therefore, rests upon the evidence produced by Mrs. Chesnutt only, and I must say that the allegation ought not to have been admitted in the shape in which it now appears, and that evidence has been taken upon it which cannot be received.

At the time of the marriage in 1832, Mr. Chesnutt was a clergyman of the Church of England, and was curate of St. Peter's Church, Walworth. Shortly afterwards he became minister of Trinity Church, Newington, and for fourteen years he so remained, residing at one or two places in the neighbourhood. There was issue of the marriage five or six children; four living at the commencement of this suit, three sons and one daughter.

The evidence affords very little, indeed, I may say no information as to the terms on which these parties lived till shortly before the separation. No relations, who associated with them, are produced, no friends, and only one servant. The Court is deprived, in this case, of the advantage it sometimes possesses of tracing the course of connubial cohabitation, and so forming a more accurate judgment upon the evidence as to particular facts. The materials before me are both scanty

1854.

CHESNUTT
against
CHESNUTT.

Judgment.

communication of a cutaneous disorder held to be an act of legal cruelty, though not by itself sufficient to found a sentence of separation.

The allegation in its present form ought never to have been admitted. The evidence is scanty and unsatisfactory, and much of it is inadmissible.

1854.

CHESNUTT
against
CHESNUTT.*Judgment.*

The use of blasphemous language and habits of intoxication, which occasioned mental suffering and bodily ill health to the wife, without bodily ill treatment or threats thereof, do not constitute legal cruelty.

and unsatisfactory; I must, however, form the best conclusion in my power from an examination of the allegation and evidence.

The 3rd article of the allegation pleads *that*, from five years after the marriage, Mr. Chesnutt treated his wife with harshness and cruelty, and particularly during the last two or three years, whilst resident in Church Terrace, Waterloo Road; *that* he used obscene and blasphemous language, was constantly intoxicated, and thereby occasioned his wife great mental suffering and bodily ill health.

Here I must pause and express my doubt whether, if this article should be proved as laid, the case so stated, according to the legal interpretation of it, would amount to cruelty, upon proof of which the Court could decree a separation. Here is no charge either of bodily violence inflicted, or of threats of personal ill treatment. However disgusting the use of the language charged, if proved, may be—however degrading habits of intoxication—however annoying to a wife, especially the wife of a gentleman and a clergyman, — these facts, standing alone, do not constitute legal cruelty. If it be said that the consequences to the wife are mental suffering and bodily ill health, I do not think that the case would be carried further. The same might be said of other vices; of gaming, for instance; of gross extravagance, to the ruin of a wife and family; — all these might occasion great mental suffering, and, consequent thereon, bodily ill health to the wife; but they do not constitute legal cruelty. Such consequences, to be the subject of legal redress, must emanate from bodily ill treatment, or threats of the same. Such I apprehend to be the clear line of distinction drawn by all the authorities.

The pleading is not quite the same as usual, and should not be drawn into a precedent.

This, however, it may be said, is merely an introductory article, and that may be true or partly so, but it differs from the usual article of this description, and it behoves me to notice it, not only on account of this cause, but lest it should be drawn into a precedent; for I should, perhaps, here observe, that the admission of this allegation was not opposed.

Intoxication proved, but obscene language disproved.

The next consideration is the proof, and I must say that it wholly fails, fails as to any important fact (for I lay out of consideration, for the present, the evidence of the children). Mr. Saltiel, Mrs. Wright, and Mr. Toussiant have been examined to prove this article. Mr. Wright deposes to intoxication, and negatives obscene language; so does Mr. Toussiant; on this article Mr. Saltiel proves nothing.

The 4th article is partly a repetition of the 3rd, but in the

concluding part, after alleging intoxication and late hours, it charges acts of violence, at times not specified.

There is ample evidence to establish the averment that Mr. C. constantly indulged in habits of gross intoxication, especially the evidence of Mr. Darvill, a medical gentleman, who attended the family for several years, and up to the year 1845; but there is no evidence at all as to any personal violence being inflicted or threatened.

Mr. Darvill's evidence, however, is important; he describes the consequences produced upon Mrs. C. by the differences between her and her husband. He describes the excitement, occasioned by the differences between Mr. and Mrs. C., to be an excitement almost bordering on insanity; but he does not know what those differences were, nor what was the treatment Mrs. C. experienced; besides, I must remember what the natural temperament of Mrs. C. was, as proved by her brother. He represents her, on the 5th interrogatory, to be a person of a very excitable disposition; so much so, that any trivial annoyance will put her, sometimes, in a very violent rage.

I can never deem this evidence proof of cruelty. First, because mental anxiety, excitement, bodily illness, though occasioned to the wife by the conduct of the husband, does not constitute cruelty, except such conduct was accompanied with violence, or threats of violence; secondly, because there is not only no evidence here to charge Mr. C. with cruelty, but not enough to say who was to blame.

Upon the fifth article, there is really no evidence whatever, save that of the children. Mr. Saltiel, Mr. Toussiant, and Ann Wright were examined on it, but they wholly fail to prove the contents of that article, viz., cursing and swearing before Mrs. C. and ridiculing religion. The evidence of the children I reserve.

The 6th article pleads that Mr. C. uttered threats in 1846, 1847, and 1848, that he would ruin his wife, and that on several occasions such threats were accompanied with blows. Mr. Saltiel is the first witness, but he can hardly be said to depose upon this article at all. The time he speaks to is after the separation, and the declarations in the absence of the wife; he says Mr. C. threatened that he would be the ruin of his wife and children, but he does not recollect his threatening any personal violence. Mr. Toussiant speaks to a similar declaration at a similar time.

I need not say how entirely this evidence falls short of the article, or of proof of a substantive act of cruelty. I do not

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General
cruelty not
proved.

The charge of
cursing, swear-
ing, and ridi-
culing religion,
not proved.

Threats of per-
sonal violence
not proved.

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against
CHESNUTT.
Judgment.

Evidence does
not correspond
with nor sus-
tain the plea,
and may be
almost con-
sidered extra-
articulate.

say that it is wholly without weight, it may have some operation in connection with other facts.

The 7th article charges an act of violence in November, 1847. Of this there is no evidence save from the children.

The 8th article charges that, in October, 1847, Mr. Chesnutt took lodgings for himself and two sons, at a house of ill fame in Allen Street, Hercules Buildings, and remained for three months. There is no averment that he resorted thither for adulterous purposes. In considering the evidence on this article, I think it necessary to observe that Mr. Saltiel's evidence is founded entirely upon certain declarations, which he deposes were made by Mr. and Mrs. Chesnutt. Of his own knowledge he knows nothing whatever. What Mrs. C. said is not evidence, but what Mr. C. said is evidence; but I regret to say that nothing of this kind is pleaded. The whole of the admissible evidence consists of declarations from Mr. Chesnutt, not one word of which is pleaded. I very much regret to see a case so conducted as this has been; it is, at least, doubtful whether all this evidence is not extra articulate, and even if it were otherwise, the opposing party has been unduly deprived of all opportunity of interrogating the witness.

But what does the evidence come to? Not that the house was a house of ill fame, in the sense in which that expression is commonly understood, but that, from Mr. Chesnutt's declaration, that his groom had had improper intercourse with the landlady, the inference is to be drawn. I must say that such a declaration, if true, though it might seriously affect the character of the landlady, will not justify such a conclusion. What is the further evidence? Sutton, the policeman, knows nothing of the matter. Underwood, another policeman, the same. The article is got up at random, and the witnesses examined at random.

Upon the 9th article, there is no proof whatever except the evidence of one of the children.

The 10th article will require more particular attention. It charges that, during the years 1847 and 1848, Mr. C. associated with men and women in the lowest grades; that he conversed familiarly with women of the town, in the public streets and elsewhere, became infected with the itch, and wilfully communicated that disease to his wife.

Charge of wil-
ful communi-
cation of the
itch to his
wife.

Such an act, if
proved, would
seem to be an
act of legal
cruelty.

Assuming that this article was proved, the first inquiry must necessarily be, what effect it would have in law. I am not aware that any such question has ever been discussed; the communication of the venereal disease is another and a very different question; the communication of such disease, in almost every possible case, imports adultery, and the bare com-

munication, without reference to the knowledge of the husband, or, rather, perhaps, on the presumption of knowledge, has been held to be legal cruelty. But the disease here mentioned is distinguished from the venereal disease in many respects. It may be contracted without any fault of the party who becomes subject to it, even without low associations of any kind. It may be communicated without previous knowledge that it was likely to exist.

I mark these distinctions, but at the same time, though I know of no authority to uphold the position, I am strongly inclined to hold that, if a husband in Mr. C.'s position in life especially, *knowingly and wilfully* communicated to his wife such disease, it would be an act of legal cruelty.

I will now consider the proof. There are two witnesses examined on this article, Mr. Saltiel, and Crump, a butcher. Crump does not depose to the substance of this article; he speaks to a transaction at Gravesend, not pleaded in the article at all. The proof depends upon the evidence of Mr. Saltiel alone; — I mean so far as relates to the disease and the communication thereof to Mrs. Chesnutt. As for Mr. Chesnutt's habits of intoxication and resort to low company, there is other evidence.

Mr. Saltiel represents himself to be a surgeon; he became acquainted with the parties in 1847; he represents himself to have been a Jewish Rabbi at one time, but I know no reason why he should be discredited, unless his evidence be contradicted, or something appear in the statement he makes which should justly entitle the Court to doubt his veracity.

His evidence, upon this article, is as follows: "Very early in the year 1848 (but I am guessing at the date, I cannot rely upon my memory as to matters of time), it was most probably in February, 1848, as pleaded, the said Mr. Chesnutt came to me, at my house, and complained of a violent itching and eruption on the surface of the skin. I told him at the time that my impression was that it was the venereal itch, having, in my own mind, no doubt but that that was the disease which he had contracted. He said, 'Good God, you don't say so!' I answered that I considered that it was such. He then asked me if it was contagious, which I answered affirmatively. I distinctly cautioned him against giving it to any other person, and he perfectly understood me, for I have seen him avoid shaking hands with people for fear of infecting them. I told him to avoid his wife's bed, and to avoid contact with the children. However, I was applied to by the said Mrs. Chesnutt, his wife, very soon indeed afterwards, and found her infected with the

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The evidence thereupon differs somewhat from the plea.

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said venereal itch. I attended her for a short time, and until she was cured of the same. She received it in a milder form, but she suffered much uneasiness."

If I am to believe this witness, this article is most clearly proved. He swears that Mr. C. had the disease; that he warned him that it was contagious, and that he ought to avoid his wife's bed; that very soon afterwards she was affected by the same disease.

The case, however, does not run quite so smoothly as I have now described it; for Mr. Saltiel's evidence goes to prove the existence of a disease not pleaded; viz., the venereal itch, a disease of which I never before heard. Of that disease Mr. C. cannot be convicted, because it was not pleaded; but I do not think that this essentially alters the case; for the charge in substance is, that Mr. C. had a contagious disorder of a cutaneous nature, and that he knowingly and wilfully communicated it to his wife, and I think that such charge cannot be rebutted by the circumstance of its being of a peculiar character, though from the absence of such charge in the pleading, it cannot be held to be of so aggravated a character.

I hold this to be an act of cruelty, but whether sufficient whereon to found a sentence must be considered presently; I must bear in mind that the gravamen of this charge is proved by one witness only.

The 11th article charges gross acts of cruelty alleged to have been committed on the 25th of March, 1848, the day on which the furniture in the house in Church Terrace was seized for rent.

All this is pleaded to have occurred in the presence of Mr. Saltiel; it turns out, however, that he saw but a very small part of the acts pleaded. When Mr. Saltiel arrived, Mrs. C. was standing at the door outside the house; Mr. C. declared that she should not come in, using gross expressions of abuse; but the witness says, such expressions were not used in her presence; he was in a most violent rage. Mr. Saltiel, finding remonstrance vain, induced Mrs. Chesnutt to leave and come to his house.

Barnabas Jarvis, who was in the employ of Mr. Newton, a carman, went on this 25th of March, to the house in Church Terrace, to remove the furniture, and he speaks to an earlier part of this occurrence. He saw Mr. C. pushing his wife along the passage; she resisted, but he pushed her out, saying, "Get along, get out!" He did not appear to use very great force; he got her to the door, and then slammed the door upon her. She complained of his having turned her out; he went to fetch Mr. Saltiel to attend Mrs. Chesnutt.

Wilful communication of a contagious disorder proved—but by one witness only.

Acts of cruelty said to have been committed on the day of their separation.

On the 13th interrogatory, he says, "Mrs. C.'s conduct was not violent or provoking. Mr. Chesnutt's conduct was not to my knowledge more violent than was necessary to rid himself from the annoyance of his wife; he put her out of the door roughly; I do not think he used more force than was absolutely necessary to turn her out."

Poulter, a carman, also present, confirms this evidence; indeed, he deposes in stronger terms, but he admits he had forgotten nearly all about it.

The evidence to which I have now referred leaves a large part of this article wholly unproved. There is no evidence as to striking, nor to the crushing of the foot as pleaded; but Mr. Saltiel was the very person to speak to the latter — yea or nay — and his evidence ought to have been taken to that effect. At the same time there is proof, and satisfactory proof, too, of gross ill usage, — of personal violence, though not in the shape of blows. What the effect will be on my judgment, I will state when I have gone through the remaining facts, and will take a view of all the circumstances combined.

I have now arrived at the 13th article, for I need not further notice the 12th. The 13th pleads a transaction which is alleged to have taken place six months *after* the separation, and it relates to the daughter of the parties in this cause, a child of about eight years of age. For obvious reasons I abstain from debating the allegations contained in this article. If they be true, no language that I could use would adequately characterise such disgusting and unnatural conduct; still, even then, I should entertain very great doubt whether such charges could properly be introduced into an allegation accusing a husband of cruelty to his wife. This is, however, beyond all doubt clear, that if the offence stated was perpetrated upon this child, it could not be imputed to the husband, unless knowledge thereof was brought home to him. True it is, also, that wholly independent of the offence itself, the treatment of this child, by and with the consent of Mr. Chesnutt, might be grossly indelicate and improper, but I could not say that such treatment, however destructive of the wife's happiness, was an act of legal cruelty.

The child herself has been examined on this article. She was examined on the 17th of March, 1849, being then only eight years of age. It is not very easy to say what degree of credit can be given to so young a witness, not produced or examined in Court; for when a witness of such tender years gives evidence, the conduct and demeanour is all in all; it is impossible to judge from a written deposition only. But be

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Gross and disgusting charge not brought home to the knowledge of the husband must be dismissed altogether.

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this as it may, and supposing this evidence to be fully credible, it does not bring home to Mr. Chesnutt a knowledge of the offence said to have been committed; it does not prove on his part a guilty acquiescence in the wicked treatment his daughter is said to have been subjected to.

Moreover, it is my duty to be more cautious in this matter from the heinousness of the imputation itself; the conduct charged is so unnatural, that it ought to be proved by evidence fully sufficient to establish the fact, and I must add that, considering the child's age, only eight years old, she has sworn rather too confidently to matters occurring when she was only six.

It is right to observe that, though the fact of ill treatment by some one is spoken to by Mr. Saltiel, his evidence does not in the least degree tend to show guilty knowledge on the part of Mr. Chesnutt. I must dismiss this part of the charge.

Something still remains behind, — the fact of abduction, and the carrying this child to a house of ill fame. There is no evidence, save from the child herself, that she ever was carried to this house in King Street. I am not satisfied with this proof, nor does the evidence convince me that the house was properly to be called a house of ill fame; indeed, had the fact been so, it might with the greatest facility have been proved by indisputable evidence, as it clearly ought to be.

Considerations
 as to the evi-
 dence of the
 young children
 of the parties
 to the suit.

With respect to other circumstances deposed to by this child, I do not feel justified in relying upon her evidence. I will now direct my attention to the evidence of the two brothers; and I must bear in mind that these children are separated from the father and under the control of the mother. I have to guard, therefore, against an almost unavoidable bias, and also against the liability to error incident to witnesses of so early an age.

Frederick Chesnutt was thirteen years of age when examined. His evidence amounts to little. He speaks to quarrels; to intoxication at various times; to the use of improper expressions, but not to violence or the threats of violence.

Robert John Chesnutt was only eleven when examined. His evidence is to the same general effect, save that he speaks more specifically to declarations, but not made in the presence of Mrs. Chesnutt. On the 7th article, he deposes to an act of gross violence, to Mr. Chesnutt striking his wife on the breast with his fists; but when does he fix this occurrence? Why in the latter part of the year 1848, when it could not possibly have taken place, for the parties were separated. It is pleaded, too,

that this happened in 1847, and that she was seriously injured in her back; but there is no evidence of such effect from any medical man. It may be that the date is a clerical mistake, but this can hardly be. It is right to observe that this boy's testimony, save as to the date, is confirmed by his sister, and that, too, with only such variations as render the evidence more probable.

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The evidence of this boy on the 9th article to prove adultery is unsupported. Alone it cannot sustain the charge.

On the 15th article this witness deposes to the transactions of March the 25th. He represents that Mr. Chesnutt struck his wife a violent blow on the back, turned her out of the house, and crushed her foot with the door. That any severe bodily hurt was occasioned I cannot believe, because Mr. Saltiel, who was sent for on that occasion, has been examined, and he is wholly silent as to any bodily mischief at all.

I have now gone through *seriatim* the whole of the charges to be found in this allegation, and I have considered and stated all the evidence which has been adduced to prove them. I must now declare my opinion upon a view of all the circumstances.

I am of opinion that the 10th article, which charges the wilful communication of a cutaneous complaint, is proved, and is an act of cruelty, but not such an act of cruelty as, if it stood alone, would require, or, perhaps, justify the Court in pronouncing a sentence of separation. The result.

I am further of opinion that the 11th article is in part proved. That is the article which alleges that on the 25th of March, the day of separation, Mr. Chesnutt struck his wife, and violently and with force turned her out of doors. The blow is not proved to my satisfaction, nor that her foot was injured, but the forcible ejection is established by competent proof; and I think such conduct falls within the limits which high authorities have laid down for the definition of legal cruelty.

It is, however, but just to Mr. Chesnutt to observe that this 25th of March, when his furniture was seized, was necessarily a day of great excitement, and I acquit him of all deliberate cruelty so far as relates to this transaction.

But, then, are not the whole circumstances to be taken into consideration? This act of violence was committed when Mr. Chesnutt was sober; he is proved to indulge in constant and most disgraceful habits of intoxication. If he could not restrain himself when sober from acts of violence, can the Court reasonably expect him to do so when under the influence of inebriety?

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and is it not the duty of the Court to guard the wife against all reasonable contingencies of similar ill usage?

To these considerations I must add that there is abundant proof that Mr. Chesnutt does still cherish against his wife feelings which may naturally lead to acts of violence. There is ample evidence of threats that he would be the ruin of his wife and children. These may not be threats of personal ill usage, but they demonstrate that temper of mind which, coupled with the preceding acts, would naturally lead to the repetition of them.

For all these reasons I pronounce for the separation.



THE HIGH
COURT OF
ADMIRALTY.

THE "CLARENCE."

In causes of collision, a verdict obtained at Common Law cannot be pleaded.

A steam-ship held solely to blame for not having given way to a sailing-vessel close hauled on the larboard tack, although porting the helm would not have thrown the sailing vessel out of command.

THIS was a cause of damage by collision, promoted by the owner of the brig "Maria" against the "Clarence," a steamer belonging to the General Steam Navigation Company.

The collision occurred off the coast of Norfolk, between 10 and 11 o'clock P. M. of the 6th of March, 1853.

The libel stating the case of the "Maria" was admitted without opposition. It pleaded in substance *that* the look out having reported the three lights of a steamer two miles distant, and about one point on the starboard bow of the brig which was then sailing close hauled on the larboard tack, a bright signal lanthorn, by order of the mate, was shown over the starboard bow; *that* shortly afterwards the said light of the steamer disappeared, whence those on board the "Maria" concluded that she intended to pass to starboard of her, but *that* instead of so doing, the said steamer, when four or five points on the starboard bow of the said brig, and distant about a quarter of a mile, suddenly ported her helm, and notwithstanding she was hailed by the "Maria," came with unchecked speed right for the said brig; whereupon, in order, if possible, to ease the blow which was inevitable, the helm of the brig was ported, but before she had barely time in the least to answer it, the steamer ran athwart her hawse, &c. &c.

An allegation on behalf of the "Clarence" was given in, which pleaded in substance *that* a vessel was reported as broad upon the steam-ship's starboard bow with a light exhibited (as lights had also been by all the sailing craft running down with the wind abaft the beam, of which there was a considerable number previously met by the said steam-ship), and which vessel from its position did not require the steam-ship's course to be altered; *that* almost immediately afterwards another vessel,

to wit, the “*Maria*,” was reported a little on the steam-ship’s port bow, or nearly right a-head; *that* the “*Maria*” when so reported, was running down upon the said steam-ship with all sails set, and, as expressly alleged, with no light exhibited, distant only about five or six ships’ length from the said steam-ship, being as far as a vessel without a light would be then seen from her; *that* the helm of the said steam-ship was immediately put hard a-port; *that* at the same time the engines of the said steam-ship were eased; but *that* the commander, finding that the brig continued following her up, had them set on again, for the purpose, if possible, of running away from the said brig; *that* the said brig, notwithstanding, by continuing her course, with her helm to starboard, came stem on into the said steam-ship, &c. &c.

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Pleadings.

The 7th article pleaded, *that* subsequent to the collision in question in this cause, an action was brought in her Majesty’s Court of Exchequer by the General Steam Navigation Company, the owners of the said steam-ship “*Clarence*,” parties in this cause, against John Mann the younger, the sole owner of the said brig “*Maria*,” also a party in this cause, to obtain compensation for the damage occasioned to their said steam-ship by the said brig, on the occasion of the collision in question in this cause, and which action was tried on or about the 2nd of August, 1853, at the assizes held at Croydon, in the county of Surrey, before the *Lord Chief Baron* and a special jury duly empanelled, and a verdict given by the said jury in favour of the General Steam Navigation Company for the amount sued for by them.

Verdict obtained in the Court of Exchequer.

The admission of the allegation, as far as regarded this article, was opposed.

Nov. 17.

Dr. *Haggard* and Dr. *Twiss* appeared for the owners of the “*Maria*”; Dr. *Addams* and Dr. *Robinson* for the General Steam Navigation Company.

DR. LUSHINGTON. I am now to decide what ought to be done in the High Court of Admiralty with respect to this article, which has been inserted in the responsive allegation, and which is opposed on behalf of those who have given in the libel.

Judgment.

It appears that it is an action brought against this vessel, the “*Clarence*,” belonging to the Steam Navigation Company, on behalf of the owners of a vessel named the “*Maria*.” There is no dispute as to the admissibility of any other part of the allegation than this article, which pleads, in substance, that the owners of this steam-vessel, which came into collision with the

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 Judgment.

"Maria," had brought her action against the "Maria" in the Court of Exchequer, and had recovered compensation by way of damages. The cause was tried on the 2nd of August, at Croydon, before the *Lord Chief Baron* and a special jury. It is further prayed to introduce an addition to the former article, in order to explain that a rule for a new trial had been moved for in the Court of Exchequer,—I presume on the ground of the misdirection of the *Lord Chief Baron*,—and that the rule had been refused. Now the question is, whether I ought to allow the article to stand, or whether it ought to be struck out.

It is important that no unnecessary matter should be introduced into Admiralty pleadings.

I consider it of no small importance in the cases of damage, now augmenting to twenty where there was only one thirty or forty years ago, that nothing should be allowed to stand in an allegation which can increase the bulk of the proceedings, adopted for the purpose of obtaining the opinion of the Court. If this article could have any effect on the determination which the Court ought to come to, when it sees the case in conjunction with Trinity Masters, then it ought to stand; but if, on the other hand, it is useless and informal, then it is my duty to reject it.

Such verdict should have no effect whatever on the minds of the Trinity Masters.

With respect to the effect it might produce on the mind of the Trinity Masters, the Court must be greatly on its guard. I should unquestionably direct the Trinity Masters not only that the verdict was not binding, but that they ought not to allow such verdict to have the slightest effect in advising the Court as to the steps which ought to be taken. In a former case I expressed myself, in substance, to that effect, though, perhaps, not in the strong language in which I think it necessary now to couch my opinion. I have a great respect for the decision of a jury, under certain circumstances; but I must candidly confess, that in running-down cases, especially where there are questions of navigation to be decided, looking at it intrinsically in itself, I can attribute very little weight to it.

The evidence on which the verdict was founded may have been quite different from that produced in the Admiralty Court: it would then be detrimental to justice to attribute any weight to it.

The practice in the Prerogative and Consistory Courts

When I consider that we do not, and cannot, know whether that verdict was founded on the same evidence which we have in this Court, then it appears to me, whatever importance may be attached to it, must fall to the ground; and it would, in my judgment, be exceedingly detrimental to the cause of justice if the Trinity Masters, notwithstanding the directions I might give, were in their own minds to attribute the slightest weight to the verdict.

There has been cited, for my information, what has been done in other Courts, namely, the Prerogative and the Consistory Courts. Now, I retain the opinion, as Judge, which I did not know until Dr. *Haggard* mentioned it, that I expressed

on a former occasion, as counsel (a), namely, that in a cause instituted for trying the validity of a will, a verdict obtained in the same cause at Common Law, ought not to be cited. Although I entertain great deference for the judgment of Sir *John Nicholl*, yet, in my mind, the reasons assigned by him are not satisfactory for the introduction of the verdict.

The Consistory Court is a different thing. Lord *Stowell*, in the case of *Elwes v. Elwes* (b), said, that he could not bring to his mind a distinct recollection as to how this question of a verdict at Common Law came to be introduced in these Courts; that it had not been a part of the ancient practice; but whether he was strictly correct or not is matter which I need not enter upon on the present occasion. There is another reason why the verdict should be received in that Court; it shows that the husband is not afraid to have his conduct exposed to a strict examination, before a tribunal, where evidence may be produced in order to show how he has behaved during the whole time of his matrimonial cohabitation, and also, that he has been enabled to bring before that tribunal witnesses to be cross-examined *viâ voce*, some of whom will, in all probability, be the same as are produced in the Consistory Court, though, of course, that does not follow as a matter of necessity. I think I may lay entirely out of mind what was said with respect to the Consistory and Prerogative Courts.

The only reason which I have heard for the admission of the article, was that stated by Dr. *Addams* just at the conclusion of his address to the Court, that it might have been urged at the hearing of the cause before the Trinity Masters, that his parties had not brought any cross-action, therefore, there was a presumption to be raised against them, that they would have come to a court of justice to assert their rights, if they supposed themselves right on that occasion. But I think this is an argument of little importance in cases of this description; and, if it were denied, the assertion would just as well come from counsel as from the plea. I confess I am not strongly impressed with the weight of that argument.

Considering, on the whole, the absolute necessity, according to my mind, of contracting the proceedings within the narrowest possible space, and disposing of the question with the greatest celerity, that being for the good of the public and the advantage of the profession, I think it is not desirable that this article should stand, therefore I direct it to be expunged. (c)

(a) *Grindall v. Grindall*, 3 Hagg. Ec. 265.

(b) 1 Hagg. Cons. 289.

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(c) At the hearing before the Privy Council (April 4.) Lord Justice *Knight Bruce* expressed sur-

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Judgment.

form no guide for the practice in the Court of Admiralty.

In divorce suits, the verdict at Law at least shows that the husband is not afraid to subject his own conduct to a strict examination, and his witnesses to a *viâ voce* cross-examination.

There being no sufficient reason for allowing the verdict to be pleaded, that article must be expunged.

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Summing-up.

Jan. 20.

Two contested points: From what quarter the wind blew, and whether the "Maria" did or did not show a light.

The 7th article having accordingly been expunged, witnesses were examined and the cause came on for hearing. It was argued by the same counsel as upon the admission of the allegation.

DR. LUSHINGTON, addressing the Trinity Masters. (a) Gentlemen,—I apprehend that if we can satisfy our minds as to two points which have been contested in this case, we shall have no difficulty in coming to a satisfactory conclusion. One of these questions is, from what quarter the wind was blowing; the other question is, whether the "Maria" did or did not show a light.

I am under the necessity of briefly stating some of the circumstances to you, though, after the lengthened arguments to which you have so patiently listened, it will not be necessary to go into the details of the evidence.

The place where the accident occurred was some little distance to the north of Hasborough; the time was ten o'clock at night, on Sunday, March 6th; the tide was somewhere about half ebb; the "Clarence" was bound to London, her course being S.E. by E. or thereabouts; the "Maria" was bound to the north, and her course was N.N.W. I apprehend these are undisputed facts in the case: but with respect to the disputed facts there are many.

In the statute 14 & 15 Vict. c. 79. s. 27., what is meant by the proviso, "and as regards sailing-vessels, to the keeping of each vessel under command."

Before I draw your attention to what are the disputed facts, you will allow me to bring to your notice the law bearing on the case, because it may so happen that we are bound by the Act of Parliament. Under certain circumstances we have no discretion, and we must see whether those circumstances arise in the present case. If they do occur, then our judgment must be bound by the Act of Parliament. The words of the Act are: "Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel" (this is a general description, we will see how far it is qualified), "due regard being had to the tide and to the position of each vessel with respect to the dangers of the channel," (I have had occasion, I regret to say, to comment upon the misfortune of these provisos being mixed up together, but I hope soon to see that removed), "and as regards sailing-vessels," (that is an important point), "to the keeping of each vessel under command."

prise that the matter could be again litigated, and intimated his opinion that, if the judgment in the Court of

Exchequer had been pleaded, it would have been *res judicata*.

(a) Capt. Bax and Capt. Pelly.

The question is, what is the meaning of this exception as regards sailing-vessels, "to the keeping of each vessel under command." The construction which I have been in the habit, subject to your better judgment, of putting upon it is this, that if a vessel be close hauled, and at the same time there is a vessel going free, that the vessel close hauled was not to throw herself into stays, because she would no longer be under command.

If this be the true construction, the question will arise, whether the "Maria" was close hauled on the larboard tack, or whether she was sailing free at the time when she saw the steamer approaching. If she was close hauled, I apprehend she would not be compelled, considering all the facts of the case and all the provisions of this Act of Parliament, to put her helm to port. If she was not close hauled, then I apprehend it would have been her duty to put her helm a-port on seeing the steamer in due time. Subject to your better judgment, this is the construction which I put on the Act of Parliament in relation to the facts such as they appear in the evidence.

Now with regard to the disputed facts; the first and most important is, from what quarter the wind was blowing, and whether the "Maria" was close hauled; secondly, what was the state of the weather; thirdly, whether the "Maria" showed a light; fourthly, as to the look-out of both vessels; fifthly, what was actually done, or what ought to have been done by each vessel.

I will briefly advert to what appears to me to be the charges made by one vessel against the other. The "Maria" charges the blame of the collision on the "Clarence" for not porting, or rather porting her helm too late. The "Clarence" charges the blame of collision against the "Maria" (not in so many words, but in effect) for starboarding her helm. This is the charge against the "Maria," not in so many words it is true; but that is the tenor, the force of it, if we look at the truth and essence of this case as it stands.

There are other matters to which we must direct our attention, such as the rate of sailing of the two vessels, which, I apprehend, does not admit of much dispute, because I think that the best evidence which will be found in the case as to the rate of the sailing of the "Clarence" is the evidence of the engineer, which brings it to about nine, not ten, nor eight, but about nine knots an hour. He represents her as going at an average speed, and the average speed is nine knots an hour. Whether you think he is mistaken in this evidence or not, from other circumstances, I must leave to your judgment. No doubt the "Clarence" was going against wind and tide at the time.

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THE
"CLARENCE."
Summing-up.

A vessel close hauled on the larboard tack seeing a steamer approaching, is not bound to put her helm to port.

Disputed points.

The reciprocal charges.

Rate of speed.

1854.

THE
"CLARENCE."
Sunning-up.

With regard to the "Maria" (speaking of the rate at which she was going through the water), she seems to have been going four knots and a half to five knots an hour.

There is another matter which I ought to bring to your notice, which is, the nature of the damage which occurred, and the inferences that may arise from it as to the manner in which the collision took place; and we shall also, as I have said, have to consider the case of the "Maria" with reference to the question whether she was sailing free or close hauled on the larboard tack.

State of the
weather.

Before I go into the case of the "Maria," I will say one word as to the weather. The weather on the present occasion is variously described, and Dr. *Addams*, I think, said about what was true when he observed, it was not a particularly fine night, neither was it a particularly dark or hazy night. It was a night, if I may use the expression, of rather a middle character; but the weather must be taken to be sufficiently clear to justify a steamer in going nine knots an hour, in a locality where she was likely to meet with other vessels, because if I am to suppose it was a darker night than that, then of course there will be blame imputable to the "Clarence" for going at such a rate as that which she is represented to have been going, because, in that case, it would be impossible to avoid any collision.

Case of the
"Maria."

Now, Gentlemen, the case of the "Maria," put very briefly, is this: she was on the larboard tack, close hauled, and the "Clarence" was seen one point on her starboard bow. Here I will observe that there is a difference between the two statements. The other evidence says, that the "Maria" was seen by the "Clarence" on her port bow, which was long after the "Maria" saw the "Clarence," and that she, the "Clarence," was one point on the "Maria's" larboard bow. That is the evidence which is to be found on behalf of the "Clarence;" but I do not dwell on these matters, because, according to any notion I can form on the subject, it is next to impossible to be able to say with certainty the precise point which a vessel bears when first seen, both vessels being in motion at the time. I take the real fact to be, that the two vessels were at one time approaching end on nearly right on. That does not militate in my judgment against what is stated by the "Maria," that as the two vessels were approaching they lost sight of the red light. Though the light might be seen at a considerable distance, the two vessels being nearly end on, yet, the two not being on strictly opposite courses, when the vessels were nearer, it is possible that the red light might be shut out. Therefore,

it does not appear to me that it is a matter of great importance to ascertain the precise bearing when first seen.

The "Maria" says, she showed a light over the starboard bow, and when the red light disappeared, she luffed up. She says, the "Clarence," when four or five points on her starboard bow, suddenly ported her helm, then the red light again became visible, and the green light disappeared. Then the "Maria" says, that at the last moment she ported. Of course she was justified in doing anything to avoid a collision at that time.

Now we come to parts of the evidence, upon which I have been strongly pressed by the learned counsel for the General Steam Navigation Company to come to the conclusion that either one or the other of the parties have been guilty of perjury. It is contrary to all principles that govern Courts: it is a universal rule in all cases, except it cannot be avoided, never to attribute the intention to commit wilful and corrupt perjury. So far as you may be able to come to a safe conclusion without attributing an offence of that kind, it is the duty of the Court so to do. In this case, though there is a direct collision in one sense of the evidence, yet there is not in another, as I will point out.

With regard to a light being shown over the starboard bow of the "Maria," the evidence of four witnesses is direct to that effect. It is very circumstantial, and the fault represented as belonging to it is, that it is too circumstantial, and that the parties have concocted their story beforehand, and have come to give their evidence in the same terms. Now, had that observation, urged by Dr. Addams with great force, been strictly correct on an examination of the evidence, I undoubtedly should say to you, you must take care not to give credence to the evidence of four witnesses, where they come to describe in the same words facts which could not make the same impression on their minds. But it is not so in fact. I have looked through the answers to the 4th interrogatory, and though they are the same in substance, yet they are not so in minute particulars, or anything like it. The master, as might be expected, speaks with great minuteness of the lanthorn, and gives a particular description of it. It had eight squares, and plate-glass round it. He says, "The burner of the lamp is one inch wide, and a proportionate thickness." Now, I see nothing extraordinary in that evidence, because I take it that a signal lamp, which is now required by law, and which was not required until a short period ago, is a matter that would make an impression on the mind of the master. He knows what lamp he uses and sees constantly. The other witnesses do not swear to the plate-

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THE

"CLARENCE."

Summing-up.

Rule of the Admiralty Court not to attribute perjury unless absolutely compelled.

When evidence of a fact by four witnesses is too circumstantial, it raises a presumption of previous concert.

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THE

"CLARENCE"

Summing-up.

The evidence respecting the exhibition of a light does not necessarily lead to the inference of perjury on one side or the other.

Great discrepancy with regard to the wind.

glass and the size of the burner. It was lighted, but the master said he did not see it at all in the fore-castle. Therefore there is not that strict uniformity which would justify you in saying that the witnesses came deliberately to tell a preconcerted story in which there is no truth.

This statement is opposed on the other side by the suggestion that it being proved that there was a good look-out,—that is, a good look-out arranged on board the steamer,—and it being agreeable to all probability that a vessel of that value and burthen would have a good look-out, the persons on board the "Clarence" did not see the light; therefore this is a contradiction between the two statements which is not reconcilable with the notion of each party deposing truly. In my view of the matter, it appears that both statements may be true. It may be true that the light was exhibited, and that the persons on board the "Clarence" did not see it, and that from a variety of circumstances. It might be that their attention was directed to a vessel immediately before the "Clarence," and it appears from the evidence that it might be so; their attention might be drawn off, and the light was not seen. That cannot be put in the same point of view which it would be if two persons were present together, and one swore to a transaction which, if true, the other must have witnessed and yet denied.

Having made these observations as to the light, I shall leave it to your consideration to determine whether you are of opinion that the "Maria" had a light or not.

Now, with regard to the next question, which is the question as to the wind: here we have certainly a very great discrepancy on the subject, one on which we have constant discrepancy. It is almost a daily occurrence in these cases that we have very different accounts as to the quarter from which the wind blew. On the present occasion there is a very great difference, varying between W. and S.S.W. That is a great discrepancy. On that subject I cannot help you; I can only state that there are respectable witnesses on both sides, who have so sworn. I can only desire you to bear in mind that there are two persons from the "Hope," independent of the case, who have sworn to the affirmative of its being W.; but I must, at the same time, tell you that they came from the same place (from Colchester) as the owners of the "Maria" came from. Therefore, perhaps we must not ascribe to their evidence that same implicit unbounded credit as if they were distinct parties, being altogether unconnected by feeling or otherwise with the owners of the "Maria." The wind is a question which you will have to determine.

With respect to the sails. There is evidence that if the wind

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THE
"CLARENCE."
Summing-up.

had been from the S.S.W., then this light collier would have carried studding sail. I know nothing of that; you must judge whether she would or would not. I do not mean to meddle with it; I do not understand it; you must form your own judgment upon it. There is evidence that the sails were kept out full; whether they were or were not, you must judge.

These are the important considerations to which I have to direct your attention.

There is another matter which I must very briefly allude to, and in order to do so I must refer to the case set up by the "Clarence." But before I do that, allow me to say this. I do not think that in the case set up by the "Maria," the "Clarence" is accused of starboarding her helm. I find nothing in the pleadings to say that the "Clarence" did starboard her helm; I find nothing of the kind. The gist of the charge is, not that the "Clarence" starboarded, and then ported, but that the "Clarence," seeing the "Maria" in time, ported, but too late. It was argued as if the charge had been made, but it is clear from the papers it is not. Dr. Addams's inference is, that it arises from the fact of the red light not being seen, but it does not appear to me that that fact would justify the inference that, *ergo*, she starboarded her helm. The courses were not precisely opposite.

Charge against the "Clarence" is, not that she starboarded, but that she ported too late.]

Now, Gentlemen, the case of the "Clarence" is this, to put it as short as I can: after stating her course to have been S.S.E., and that the wind was blowing fresh from the S.S.W., it states that having seen a vessel on the starboard bow, the "Maria" was reported a little on the steam-ship's port bow, distant five or six ships' length, and she could not be seen further off, that is, not be seen further off without a light, and considering what was the state of the weather. There is a variation as to the distance from which the ship was seen, the master stating it to be a much shorter distance; that he discovered her one or two ships' length off. When vessels are seen so much in haste as this was, and where evidence is afterwards taken, various opinions will be formed as to the exact distance of the vessel, and you must take it, I think, to be about four ships' length. They then say that the helm of the steam-ship was immediately put hard a-port, the second mate running to assist the man at the wheel in so doing, whereby her course was altered from two to two and a half points, at the least, by the order of the commander. That by the same order, at the same time, the engines of the steam-ship were eased, but the commander, finding that the brig continued following her up, had them set on again, for the purpose, if possible, of running away from the

Case of the
"Clarence."

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THE
"CLARENCE."
Summing-up.

brig. That the brig, however, notwithstanding, by continuing her course with her helm to starboard, came at the rate of from six to seven knots an hour, stem on, into the steam-ship, abreast of the mainmast. Here is a matter which I must entirely submit to you. Here is a steamer going at the rate of nine or ten knots an hour, and a brig proceeding at four and a half knots or five; the steamer's engines are set on again, and the steamer is, according to this, overtaken by the "Maria," and it may be so; that I know nothing about. It is clear that it could not be so if the wind was W., but if it was S.S.W. you will consider whether it is consistent with probability that the "Maria," then going at such a rate, would overtake the steamer. It is right that I should ask you to bear in mind that she had eased her engines, and that the engines having been eased, it is possible; but that is subject to your consideration.

Evidence as to
the nature of
the damage.

I have been very anxious that in this case nothing should escape our attention. I certainly have set down other observations, but I doubt whether they are of sufficient importance at this hour of the day to detain you with further disquisition except that much has been said about the evidence of Mr. Bayley. There is no doubt that Mr. Bayley is an experienced surveyor of shipping; there is no doubt he is a gentleman of high character, and his name is well known. I entertain not a shadow of doubt that he has given an honest and true account, according to his judgment, of what he saw. I take it that is one thing; but the inferences to be drawn from that state of things are totally different matters. These inferences must rest on your nautical knowledge.

I have had occasion very many times to discuss at very great length the effect of evidence as to the damage which has been done to a vessel. I certainly am not in a condition to pronounce any satisfactory opinion thereon.

Now, Gentlemen, I believe that I have brought under your attention all that I have to do. If you please we will adjourn, and then I shall have the benefit of your advice in coming to a decision.

On returning into Court, after consultation with the Trinity Masters,

Judgment.

The "Maria" was close hauled: it was, therefore, the duty of the steamer to give way.

DR. LUSHINGTON. The gentlemen with whose assistance I am favoured, are of opinion that the "Maria" was close hauled at the time, and they have formed that opinion from a consideration of the whole of the evidence in the case, and especially with reference to the evidence which has been given by the master of the steamer, that all the vessels which were going

north, had the wind about a-beam. Taking all these circumstances into their consideration, they have come to that conclusion; and that being so, it was the duty of the steamer to give way, and I must pronounce against the steamer.

Dr. Robinson. Will the Court allow me to say that I am asked by the Steam Navigation Company to request the Court to put to the Trinity Masters the following question: "Whether the 'Maria,' by porting her helm, would have thrown herself out of command, within the meaning of the Act of Parliament?"

THE COURT. I cannot put a question of law to the Trinity Masters.

Dr. Robinson. Will the Court then put to the Trinity Masters the simple question, "Whether the 'Maria,' by porting her helm, would necessarily have thrown herself out of command?"

THE COURT expressing its assent, and after a brief conference with the Elder Brethren, said,—Certainly it would not; that is a question which, I think, no one can doubt about. There must be some misapprehension; you must have misapprehended me. If she had ported her helm, she certainly would not have thrown herself out of command. She was going, according to her statement, a N.N.W. course; therefore, if she ported her helm she would not have thrown herself out of command. She would if she had starboarded. I wish there may be no mistake. That question must have arisen from my using some term erroneously, when commenting on the Act of Parliament. I never supposed she would throw herself out of command by porting. She would go all the way to the N. She would recover her course again. (a)

Proctors for the "Maria," *F. Clarkson*; for the steamer, *Toller*.

(a) This case was appealed and argued before the Judicial Committee of the Privy Council, on the 4th and 5th of April, when their Lordships deferred judgment.

THE "TRIDENT."

THIS was a cause of damage promoted by the sailing barge "Southampton" against the steam-ship "Trident," belonging to the General Steam Navigation Company.

About 11.30 P.M. of the 7th of May, 1853, the barge was proceeding, laden with bricks, from Crayford, in Kent, to Pimlico. She was in Bugsby's Reach, crossing from the Essex to the Kentish shore, close hauled, on the starboard tack, when she

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THE
"CLARENCE"
Judgment.

although the porting of the helm would not have thrown the "Maria" out of command.

THE HIGH
COURT OF
ADMIRALTY.
Feb. 4. 1854.

A steam-ship proceeding down the Thames at night, meeting a sailing barge, close hauled on the starboard tack, nearly in mid-channel,

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THE
"TRIDENT."

Pleading.

in Bugeby's Reach, stopped her engines and ported her helm; but held to blame for not having reversed. Held, also, that the barge was not bound to go about.

Summing-up.

The statement in these cases are usually exaggerated.

descried the steamer coming down the river at a distance of about 300 yards. She hailed the steamer to stop, and the steamer hailed her to port and go about. It seems the steamer did stop, and port her helm, but did not reverse. They came into collision, and the barge was sunk.

Dr. Haggard and Dr. Twiss appeared for the "Southampton;" Dr. Addams and Dr. Robinson for the steamer.

DR. LUSHINGTON, addressing the Elder Brethren (a), said: Gentlemen,—It is much to be lamented, that in many of the cases which come under the consideration of this Court, not only in cases of collision, but also in cases of salvage, very exaggerated statements are put forth both on the one side and on the other. I have frequently had occasion to comment upon such statements, and I have invariably felt it my duty to censure them.

I regret that, in the present instance, the statements which are set up in some parts of the case are infinitely stronger than the circumstances would justify; and, perhaps, in no respect more so than as regards the speed at which the steamer was going. It is next to impossible that the persons on board the barge, circumstanced as they were, could judge with any accuracy at what rate the steamer was going down the river; and, with a natural feeling for their own case, they put it at the highest rate.

It is still more to be lamented that any charge should have been made, notwithstanding the unfortunate accident which occurred, against those on board the steamer, of having been reckless of the lives of their fellow creatures. The only ground for that charge, as it has been preferred in this instance, is, that the persons on board the barge did not see any person coming to their assistance, and, consequently, without hesitation, they come to the conclusion that nothing was done. I must say, that charges of this description ought not to be made, founded on the mere absence of knowledge. They ought never to be brought forward, except the facts will justify them.

Having made these observations, I now proceed to direct your attention to the circumstances of this case, for the purpose of ascertaining who is to blame for the collision. It may be, as you well know, that both parties are to blame, or only one, or neither.

I think I cannot do better than state to you, in the first instance, the charge which is set up in the 5th article of the libel, and then point out to you the corresponding article of the alle-

The cases on both sides.

(a) Captain Ellerby and Captain Shuttleworth.

gation, because these will contain all the matter which, more especially, will require your consideration.

The persons on board the barge say, "That the aforesaid collision, and the damages consequent thereon, are imputable solely to those on board the said steam-ship 'Trident,' to wit, from the want of a good look-out on board that ship, and from the unjustifiable speed at which she was steaming, and from the improper navigation of her in not having kept clear of the said sailing barge, as she was bound to have done, and that the said collision was not owing to any misconduct on the part of the said sailing barge 'Southampton.'" Such, Gentlemen, are the grounds on which the owner of the "Southampton" claims a decision at your hands.

On the other side, the 6th article of the allegation of the General Steam Navigation Company states, "That the collision in question in this cause was altogether imputable to those on board the said barge, and was occasioned by their not having, when they first saw the lights of the said steam-ship, and subsequently, when hailed so to do by those on board the said steam-ship, put their helm to port and gone about, as they could, and as it was their duty to have done, whereby no collision could have occurred between her and the said steam-ship; and that the said collision was in no way attributable to those on board the said steam-ship, who, on finding that the said barge made no alteration in her course, and was coming head on into the said steam-ship, by stopping the engines and putting the steam-ship's helm hard a-port, and thus bringing her as close to the tier of colliers on the south side of the river as she could be brought, did everything they could to prevent the said collision."

Having now, Gentlemen, shortly put before you the charge which is made on the side of the barge, and the defence, and the counter charge which is preferred against the persons on board this barge on behalf of the General Steam Navigation Company, I will next advert generally to the facts in this case, some of which are matters of common admission between the parties, and not discussed. The steamer, it appears, was going down the river upon the night of the 7th of May, having quitted the Saint Katherine's Dock about ten o'clock; and having been detained in her progress in consequence of a collision with another vessel (a) (what was the cause of the detention is not of

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THE
"TRIDENT."
Summing-up.

Facts admitted
on both sides.

(a) The "William" sloop, of Grimsby, whose owner brought an action against the General Steam Navigation Company, and obtained a verdict with 85*l.* damages; but on

the 6th of February, 1854, a rule for a new trial on the ground of the verdict being against the evidence, was made absolute.

1854.

THE

"TRIDENT."

Summing-up.

The points in
dispute.

the slightest consequence; it is not what took place before the steamer got to Blackwall, but afterwards, that we have to consider). We know nothing about the previous collision: it merely comes out, by interrogatory, that it was the cause of the delay, and that is all we know of it. The steamer then comes round Blackwall Reach, and it is stated that she keeps to the north; and I presume that she would do so, because it was necessary for her so to do for her own safety in rounding that point. It is also further stated that, after having so kept to the north, on coming into the Reach, she was kept as near to the south shore as she could be, consistent with her safety. This, Gentlemen, is one of the matters in dispute; and the question which it will be for you to consider is, whether she kept as much as possible to the south, the Kentish shore, in conformity with the provisions of the Act of Parliament; because the Act of Parliament, you know, directs that all steam-vessels shall keep as far as is practicable to that side of the fair way or mid-channel which lies on the starboard side of such vessel.

With respect to this part of the case there is a great deal of contradictory evidence, and I am not surprised at it, and for various reasons. In the first place, I take it the channel there is exceedingly narrow, and a very little space makes a very great deal of difference, if I may so express myself; because, where the channel is considerably less than a quarter of a mile, of course twenty or thirty fathoms tell a great deal more than where the channel is wider. It is said by those on board the steamer that they got as close as they could to the south side of the channel, considering that there was a tier of colliers on the south side, and they were bound to take care not to run into the colliers. Their evidence is uniformly to that effect. The evidence on the other side, which has been much commented upon, does not go the length of saying they were not so close as they might have been; but the true effect of it is, that, in the opinion of the persons on board the barge, they were not so close as they might have been. Probably, if any judgment was to be formed at all, the persons on board the barge were not the best judges of the precise distance between the steamer and the colliers at that moment.

The circumstances of the night demanded great care and caution on the part of the steamer.

This being so, and the tide being little more than three-quarters' flood, the wind being N. N. W., and the night not particularly clear, it is perfectly manifest, in the first instance, that it was the duty of those on board the steamer to navigate with great care and great caution; to navigate, I repeat, with great care and great caution, because of the part of the river in which they were, and because, being a flood-tide, vessels

would be met. Therefore it was their duty to observe all the regulations for the purpose of passing with safety any vessel they met, and too great caution could not be employed.

The wind then at the time being from N.N.W., there is some discussion as to the extent of the breeze, upon which I cannot render you the slightest assistance, for I can form no opinion from the evidence, independently of nautical knowledge, as to what the extent of wind was at that time. However, be that as it may, it was sufficient to enable the schooner, of which so much has been said, and this barge, to come from the north to the south side together close hauled on the starboard tack. That is what they were doing at the time.

Whilst in their progress from the north to the south shore, it appears that the persons on board the barge descried the steamer; and it seems to me that the evidence goes to the extent of saying they saw the green light. I cannot see how it is possible, when the steamer was rounding Blackwall Point, but what they must have seen the green light; but the argument goes to the extent that they did not perceive it till they were close by. What they swear to is an anterior period; and I apprehend it would be so. I see no discrepancy at all in the evidence in saying the green light was seen at one time on board the barge.

Now, the representation of those on board the barge is, that having seen the green light, they continued on their course — that is their statement — until they saw the steamer approaching their course; and then they hailed the steamer to stop, for the purpose of avoiding the collision. Then, they say, they were hailed by the steamer to port their helm, and to go about; that when the steamer so hailed them they did port their helm, but the steamer did not port her helm in time, or sufficiently, to avoid the accident, and the consequence was the collision took place.

Such is a general statement of the facts of the case, Gentlemen, and I will only advert to one other fact, before I submit to you the points on which I shall more especially request your opinion. The fact to which I allude is, the place where this collision actually did occur. If we can fix the place of the collision, we shall have no difficulty in fixing which party is to blame. Now, if the diagram be correct, this vessel, the barge, was found, after she sank, to be a little to the northward, and very little to the northward, of the mid-channel. It must rest with you to decide this point, whether the place where the vessel was found sunk and the place of the collision are one and the same, or what difference there is between them; because the place of collision is very different from the place where the

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THE
"TRIDENT."
Summing-up.

If the exact spot where the collision occurred can be discovered, the question of blame would be decided.

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THE

"TRIDENT."

Sinking-up.

vessel was found. It appears to me that when Dr. *Addams* said that the mode in which the steamer struck the "Southampton" would slew her head round, that is undoubtedly true; and I cannot entertain a shadow of doubt that her head must have been slewed round; but the question is, whether she sank immediately, or whether, if she did not sink there, which way the tide would drive her. That is a point on which I do not mean to hazard an opinion. I do not mean to form a judgment as to that. The only judgment I could form is, that she must have gone in the direction of the tide, and no other. But that will only assist your judgment to the following effect: it will show whether the averment is true, that the "Trident" was as near as possible to the Kentish shore at the time of the collision.

Now, the questions which occur to me are these:

Did the steamer proceed with sufficient caution?

With regard to the steamer, I shall request your opinion whether, considering that the channel was narrow and the tide about half-flood, and that vessels might be expected coming up the river, the "Trident" was going sufficiently slow, and took the proper measures to avoid the collision, remembering that she did port her helm, and did stop her engines, but did not attempt to reverse her engines till the collision had taken place.

Measures may be right, yet the vessel to blame, because the measures were not taken in time.

In all these cases there are, if I may use the expression, double questions to be considered. The first question is, whether the measures were right; the second always is, whether the measures were taken in time; because if the measures were right and taken in time, there is no blame; if they were right, but not taken in time, then there is blame. So much relates to this vessel, the "Trident."

As regards the barge, I will put the question in the way in which the charge is preferred against her, which I think is the fairest way for all parties in which I can put it. It is alleged "that the collision arose from the people on board the barge not having, when they first saw the lights from on board the steamer, put their helm to port and gone about, as it was their duty to have done."

Questions:—
Did the barge port her helm?
Was she bound to go about?

The first question, then, which I shall submit for your consideration will be a nautical question; viz., not whether the persons on board the barge were bound to put their helm to port; but, whether they ported their helm or not: they allege they did, and there is no direct contradiction. The next question is, whether they were bound to have gone about, remembering that this was a vessel close hauled on the starboard tack; and it is alleged by the steamer they were bound to go about. Now, it must always be recollected that I am putting the ques-

tion whether it was their duty under the circumstances, because if the going about would have avoided the collision, we all know that a vessel would have been justified in so doing. That is quite a different thing. It is upon that ground we always hold persons entirely free from blame who starboard their helm at the last moment to stop the effect of a collision, though it might be erroneous at an earlier period.

With regard to themselves, those on board the steamer say they are not to blame; for as soon as they discovered that the barge did not make such alteration as they expected, they stopped the engines, put the helm hard to port, and brought her as close as they could to the tier of colliers. You will have to consider whether they did stop their engines, and put their helm hard to port, and whether they ought not to have reversed the engines.

I have to suggest one other question, and one only, as relates to the barge; that is, whether the collision was occasioned by the barge not hoisting a light? There was no light on board the barge. The Act of Parliament directs that a light shall be hoisted, when it is necessary, on board sailing-vessels. The Act of Parliament states (I will not trouble you, for the twentieth time, to go over the express words of the Act) that the persons whose duty it was to hoist a light shall not recover if the collision was occasioned by omitting to hoist the light. If you are of opinion that the collision was occasioned by the omission to hoist a light, then it is evident, whatever may be the other merits of the case, the barge could not recover.

Now, Gentlemen, these are the points on which I wish to have your opinion; and if you are desirous, we will adjourn to the next room.

On returning into Court, after conference with the Trinity Masters, Dr. LUSHINGTON said:—

“The Trinity Masters are of opinion, and I agree with them in all the conclusions to which they have come, that this collision took place nearly in mid-channel; that the steamer ought to have eased, stopped, and reversed her engines, so as to have avoided the collision. They are of opinion that the barge was not to blame for not having ported her helm sooner and for not going round, and they think the collision was not occasioned by the barge neglecting to hoist a light.

“I will mention for myself, not on the part of the Trinity Masters, but on my own part, that I have read this evidence with great attention, and I am not satisfied that there was such a look-out kept on board this steamer as ought to have been

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THE
“TRIDENT.”
Summing-up.

Did the steamer stop her engines, and put her helm hard to port? Ought she to have reversed her engines?

Was the collision occasioned by the barge not having a light hoisted?

Judgment.

Collision took place nearly in mid-channel. The steamer alone to blame.

In the opinion of the Judge, the look-out on board the steamer was not sufficient for the circumstances.

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 "TIDBIT."

kept, considering all the circumstances of the case. I am not satisfied with the evidence of the master in that respect."(a)

Proctors, for the "Southampton," *F. Clarkson*; for the steamer, *Toller*.

(a) This case was appealed and argued before the Judicial Committee of the Privy Council on the 5th of April, when their Lordships affirmed the judgment with costs,

but, to mark their disapproval of the charges of misconduct made by the "Southampton," directed a deduction of 10*l*. from the costs in each Court.

THE HIGH
 COURT OF
 ADMIRALTY.

THE "ARAMINTA."

A vessel of 845 tons, with a regular crew of thirty hands, and ten extra, sailed with emigrants to Geelong, in Australia. On arriving, the master proposed to the crew to proceed to the diggings, under certain arrangements for division of profits between the owners and the crew. The master went with them, and after some time found the men deserting; and therefore proposed the immediate return to the ship. Only fifteen returned; extra hands could be engaged only at an exorbitant rate. The master, therefore, proposed that if the crew would take the ship, so short-handed, to Bombay, he would divide the amount of wages due to those who had deserted among those who remained. They assented,

THIS was a cause of subtraction of wages, by John Hart, carpenter, Henry Stafford and James Snelson, able seamen, against the owners of the ship "Araminta."

Their summary petition alleged *that* in the month of June, 1852, they were duly shipped and hired in Liverpool to serve on board the "Araminta," a ship of 845 tons burthen, for a voyage to Geelong, in Australia; from thence to any place in the China or India seas; and back to any part of the United Kingdom; *that* she arrived at Geelong on the 3rd of October, 1852, and landed her passengers; *that* ten of her crew, having shipped at Liverpool under agreement to be discharged in Australia, then left her, whereby her crew was reduced to thirty hands; *that* on the ship's arrival in the Bay of Geelong, Thomas Feran, the master, of his own motion, mustered the crew, and addressing them, said that crews were deserting their ships to go to the diggings; and then freely and voluntarily proposed to the crew that they and he (the said master) should proceed together to the Bellarat diggings, near Victoria, to dig for gold, and that one third of the produce earned should be assigned to the ship's owners, and that the remaining two-thirds should be apportioned among the crew according to the rates of the wages, one share and a half being first deducted for the said master; and that their wages should be stopped during their absence from the ship; *that* all the crew of thirty hands accepted the proposition; and accordingly, on the 18th of October, the master and twenty-seven of the crew (three being left in charge of the ship, under condition of sharing equally with the rest) proceeded to the Bellarat diggings, and were absent from the ship two months and twenty-eight days, at the expiration of which the parties proceeding in the cause, and some others, returned with the master to the ship. *That* the proportion of the proceeds of this expedition received by or on account of the owners of the ship amounted to about 400*l*.

*That while at the diggings, fifteen of the crew, including the mate, steward, cook, and six able seamen, declared to the master that they repudiated the aforesaid agreement, and should work on their own account, and should not return to the ship; that they accordingly deserted, so that only fifteen hands continued in the performance of their duty; that on the 18th of January, 1853, while the ship was still in Geelong, and bound to Bombay, the master voluntarily called together these hands, and then and there declared and admitted to them that it was very difficult to procure men in that port to supply the place of those who had deserted, and that a very high rate of wages was then demanded by seamen in the said port; that he then and there voluntarily and of his own accord offered and proposed to the said fourteen hands, that if they would navigate the said ship, so short-handed, to Bombay, he would, in consideration thereof, pay and divide among them the net amount of wages which would have been payable up to that time for the outward voyage among the rest of the crew who had deserted the ship if they had not so deserted her, but had continued at their duty on board her; and that such payment should be made in each case in addition to, and not in diminution of, the wages due to each of the said crew then on board under the ship's articles, and in addition to, and not in diminution of, the proceeds of their earnings at the diggings, under the aforesaid agreement; that each of the said fourteen hands thereupon assented and agreed to the said offer or proposal; that in pursuance of this arrangement, the said master, having calculated the amount of the said forfeited wages, and deducted all charges thereupon, declared to the parties proceeding in the cause that the sum of 8*l.* 10*s.* was the share to which each of them was entitled under the said agreement; and the said master then and there freely and voluntarily, and in pursuance of the said agreement, paid over to each of them the sum of 8*l.* 10*s.*, and declared at the same time to each of them, that he made such payment to them in addition to, and not in diminution of, the wages due to them under the ship's articles, and as a present for navigating the ship so short-handed from Geelong to Bombay.*

*That while the said ship was so lying at Geelong, seamen could only be procured with very great difficulty, and at a very high rate; to wit, at the rate of 40*l.* for each man for the voyage from Geelong to Bombay. That the ship sailed from Geelong on the 22nd January, with fifteen hands only, and therewith safely made the passage to Bombay, with great labour to the said crew; arrived there on the 12th of April, and discharged her cargo of coals, whereby her owners obtained great profits*

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Statement.

and each received his proportion. The vessel arrived in safety at Bombay, where the crew was completed. On arriving at Liverpool, the owners deducted, as wages advanced, the sum paid to each out of such forfeited wages. *Held,*

- 1st. That a contract for reward beyond the wages under the mariner's contract is illegal and void.
- 2nd. That a payment made by the master under such contract is illegal, and might be recovered at law by the owner.
- 3rd. That instead of driving the owner to law for his remedy, the Court of Admiralty should give it him by allowing the deductions.

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which they would not otherwise have obtained. *That* while at Bombay the master shipped twenty-five additional hands; and the ship, having taken on board a cargo of cotton, gum, nuts, &c., sailed for Liverpool, where she arrived on the 11th of September, 1853, and there discharged her cargo; and on the 15th, the parties proceeding were duly discharged from the service of the said ship.

That after the ship's arrival at Liverpool, to wit, on the 16th of September, the master delivered to each of the said parties an account, signed by himself, of the wages due to each of them, and of the deductions to be made therefrom, pursuant to the 95th section of the Mercantile Marine Act; but, notwithstanding the premises hereinbefore stated, the master included in the deductions set forth in each of the said accounts, under the head of cash received from the said master by the said seamen, the said sum of 8*l.* 10*s.*, which had been paid to each of them, the said John Hart, Henry Stafford, and James Snelson, by the said master, as an addition to the wages due to each of them by virtue and in pursuance of the aforesaid agreement.

That the said ship, by her said voyages, earned very considerable freight; *that* during all the time the parties proceeding were in the service of the said ship, they each of them well and truly performed their duty, and were obedient to all the lawful commands of the said master and other inferior officers, and well deserved the wages schedulate; *that* so much or greater wages were then given to persons serving in the like capacity on board ships of the like burthens, and on like voyages; *that* the said John Hart, Henry Stafford, and James Snelson, have made repeated applications to the master and also to the owners of the said ship for the payment and satisfaction of the wages due to them for such their services, but without being able to obtain the same; *that*, &c.

This libel was opposed, but admitted; the three parties themselves were the only witnesses examined upon it; they were cross-examined, but no defensive plea was given in on behalf of the owners. The cause came on for hearing upon the evidence of the parties proceeding.

Sir *J. D. Harding* Q. A., and Dr. *Spinks*, appeared for the seamen; Dr. *Addams* and Dr. *Twiss* for the owners.

Feb. 3.

March 17.
 Judgment.
 The circumstances.

DR. LUSHINGTON. The present suit is brought for the subtraction of wages; and it is necessary, before I state the legal questions which have been discussed at the bar, to settle, so far as is practicable, what are the facts of the case. The Court, in so doing, must proceed according to its accustomed rule, accord-

ing to the *allegata et probata*, paying due consideration to what may come out upon interrogatory.

I have before me the libel, the depositions of three witnesses examined thereon, the mariners' contract, and the log-book.

The suit is brought by three seamen; there is no substantial difference in their cases. In June, 1852, they entered into articles, while the ship was at Birkenhead, to proceed on a voyage to Geelong, in Australia, and afterwards to any ports in the China or Indian Seas, and back to England,—her whole voyage not to exceed three years.

The "*Araminta*" is of the burthen of 845 tons; she took out from 300 to 400 emigrants; the crew consisted of thirty hands, but there were ten supernumeraries in consequence of the number of emigrants. They were to be discharged at Geelong. The vessel reached Geelong on or about October 4. 1852; and, according to the evidence, somewhere about that time the master offered the crew either to pay them off in Geelong, and ship them again at the rate of wages usual at the port at the time, or that they might go with him to the diggings; an agreement was at last entered into, by which it was settled that the expenses should be paid on behalf of the ship, and that one third of the gold should be appropriated for the benefit of the ship, and the rest should be shared amongst them according to a fixed scale; it was also agreed that the wages should be stopped from October 18. during the absence of the crew from the ship. The crew went accordingly, worked at the diggings, gold to the amount of 7 lbs. weight was received by the master for the benefit of the owners; nearly half the crew refused to return to the ship; about fifteen did return; the master proposed to the men who returned to navigate the ship to Bombay, and offered, if they consented to do so, to pay them the money amongst them that was due to the men who had deserted. It appears that a seaman for the run from Geelong to Bombay could not be got for less than 40*l.* each; the money that would have been due to the seamen that did desert was distributed amongst the crew; and it is sworn by the witnesses that it was paid in addition to the wages. The gold was distributed about the same time. The ship then sailed to Bombay, having left Geelong on January 22nd, the crew being fifteen hands only, including the master; that voyage lasted about eleven weeks, the cargo of coals was there discharged and sold, the cargo of cotton and other articles taken in, and with the addition of twenty-two Lascars and one Englishman, the voyage to Liverpool was accomplished, where the ship arrived on September 11. 1853. The men claimed their wages, the owners claimed to deduct two months and twenty-

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THE

"*ARAMINTA*,"
Judgment.

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"ARAMINTA."
Judgment.

Sole question, whether the owners are justified in deducting from the wages the sum given to the men by the master as their share of the forfeited wages of the others.

Evidence is to the effect that the proposal of the master was voluntary; probability is, that he acted under fear that his crew would desert.

From the evidence, it appears that in consideration of the crew navigating the vessel to Bombay with fifteen hands, instead of thirty, the master voluntarily proposed to divide the forfeited wages among them.

Official log-book so negligently and irregularly

eight days at the diggings, and also the sum of 8*l.* 10*s.*, which was the amount distributed by the master as the proportion due to each able seaman of the wages forfeited by those who deserted at Geelong.

The mariners assented to the account so made out by the master, with the exception of this 8*l.* 10*s.*; the only question, therefore, in the cause is, whether the owners are entitled to deduct this 8*l.* 10*s.* from the amount of wages. The Court is relieved from any consideration as to the diggings, for that arrangement has been assented to by the owners, who have taken their share of the gold, and have deducted their wages during the period the men were at the diggings.

There is a very material difference *in fact* (the effect will be considered presently) between this case and all those which have been cited at the bar, for this is not a suit to recover any amount stipulated to be paid in addition to wages; it is a question whether an amount actually paid in addition to wages can be the subject of deduction.

In proceeding to ascertain the exact state of the facts, I will notice, that questions have been put to the witnesses as to whether the master, in proposing to go to the diggings, and with respect to all the arrangements relative thereto, did not act under compulsion. All these interrogatories are negatived; the strong probability is, that he so acted under the apprehension that his crew would desert, either from the temptation to go to the diggings, or for the sake of the very high wages then given at Geelong for sailors to man ships proceeding therefrom.

But whatever may be the truth in this respect, it does not appear to me to have any direct bearing on the present question, and for many reasons: 1st. Because the owners have substantially affirmed that transaction; and, 2nd. Because the allotment of the forfeited wages is a distinct and separate matter. So far as the evidence extends, this was a voluntary offer of the master, and in consideration of the crew, only fifteen in number, undertaking to navigate the vessel to Bombay without additional seamen,—a proceeding which manifestly entailed extraordinary labours on them, and was productive of great saving to the owners, for the hire of seamen at Geelong was most exorbitant.

The only further evidence in this cause, if I may so denominate it, is the log; there is no plea, and consequently the master has not been examined.

With respect to this log I think it may be disposed of in a very few words. It is headed, "Official Log-Book, kept distinct from the ordinary ship's log," and purports to be made and kept

in pursuance of the Mercantile Marine Act of 1850. The special object is to record matters relating to the character and conduct of the crew. The first objection to this log is, that with regard to the transactions when the vessel arrived at Geelong it is wholly silent; there is an entry after the return of the crew to the ship, which date is under the entry of January 18. 1853. It refers to the return of the crew to the vessel, but is wholly unimportant as to the transaction of forfeited wages. There is a *subsequent entry in October 13. 1852*, which shows the gross irregularity of this log, nor in this nor in the subsequent entry of January 15. 1853, is there any matter of importance. Again, on January 23. 1853, it is stated that Henry Stafford refused to work; but this, too, has nothing to do with the present case, nor is there to be found one syllable of the remainder of the log that refers to it. I may further observe that, except in the cases of two deaths, the log is written by the master alone. This document appears to me to be wholly worthless and irrelevant, as relates to the present inquiry.

I must then take the state of facts to be, that the master voluntarily distributed the forfeited wages amongst the crew from Geelong to Bombay. I have used the expression *voluntarily*, because I think the effect of the evidence is, that the crew exercised no compulsion towards him, though, perhaps, in another sense of the word, such payment was not voluntary, and the more apt expression may be, and the one nearest the truth, that he was compelled by circumstances to make that payment; however, I have, perhaps, dwelt too long upon this point, because I strongly incline to the opinion that, if this were a contract for any reward beyond the wages stipulated for in the mariners' contract, it would not matter whether the contract was compulsory or voluntary; it would in either case be illegal, and such is the effect of all the authorities cited.

In only one respect do I wish to guard myself, and that is, I do not wish it to be inferred from anything I now say, that mariners, having completed the voyage outwards, are compellable to make the return voyage when the number of the crew is so small that risk of life may be incurred.

I agree, then, in thinking that, if this were a contract made during the voyage, it would be void for want of consideration, according to the expression of Lord *Ellenborough*, in *Still v. Myrick* (a), and in accordance with all the other cases.

I have now to decide how far this law, as to contracts, applies to deductions. Generally, the deductions claimed from

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"ARAMINTA."
Judgment.

kept, that it renders no assistance whatever.

Whether a contract for any reward beyond the wages stipulated for in the mariner's contract be voluntary or compulsory, it is illegal.

Semble, a crew not compellable to proceed on the return voyage so short-handed as to risk life.

The contract being illegal, the payment is

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illegal, and
might be re-
covered by the
owners by
action.

seamen's wages are, advance of money or slops, and justice clearly requires that they should be deducted. This is the practice, and I am not aware that it stands upon any authority or rule.

I have now to deal with a payment and not a contract, but I am of opinion that the payment itself was illegal, and I apprehend the money might be recovered by the owners by action, and for this position I refer to *Smith's Mercantile Law* (a), and the cases there cited. "We have seen," he says, "that payment or delivery to an agent, is payment or delivery to his principal; this holds good *vice versâ* (b), and, therefore, where the agent has paid away or delivered over his master's property, on a consideration, which fails, or otherwise, under circumstances which would entitle him to recover it, the master may, if he please, maintain an action, in his own name, to be reimbursed (c), which it will often be advisable to do, in order not to lose the agent's evidence, and in some cases the master may sue, for this purpose, where the agent could not; for instance, if the agent and a third person have joined in applying his property to an illegal purpose, as to the insurance of lottery tickets, for though the agent, being *particeps criminis*, might not be able to recover on account of the rule *pari delicto potior est conditio defendentis*, yet that rule does not affect the master, who is guilty of no criminality. (d) And where the agent disposes of the master's property, without either an express or implied authority, as if he sell his master's goods on credit in a trade, the usual course of which is to sell for cash only, the master, though he may affirm the transaction, may, if he please, repudiate it, and recover the property thus tortiously disposed of from the donee." (e)

The Court will
not drive the
owners to their
remedy at law,
when it can
give them their
remedy here
by allowing
the deduction.

Then, if the owners could recover this money by action, ought I to leave them to their action or to allow the deduction? I can perceive no satisfactory reason why I should put the owners to this inconvenience, nor why I should not allow a deduction of the moneys illegally advanced. I will further observe that I think it the duty of the Court to act up to the spirit of the law, which holds all such payments and contracts illegal, and I should, I think, fail in so doing if I, in effect, gave the mariners the money first, and left the owners to the empty remedy of an action.

(a) Ed. Dowdeswell, p. 145.

(b) *Coare v. Giblett*, 4 East, 85.

(c) *Duke of Norfolk v. Worsley*,
1 Camp. 337.; *Anchor v. Bank of*
England, Doug. 637.; *Stevenson v.*
Mortimer, Cowp. 805.

(d) *Clarke v. Shee*, Cowp. 197.

(e) 12 Mod. 514.; *Wiltshire v.*
Sims, 1 Camp. 258.; *Guerriero v.*
Peile, 3 B. & A. 616.

I have not thought it necessary to consider the provisions of the statute in this matter, but I may observe that this appropriation of the forfeited wages is clearly a violation of the statute 7 & 8 Vict. c. 112. s. 9.

I must pronounce for the deduction, but under all the circumstances of the case, and considering that the owners reaped the benefit of the crew's having taken the vessel short-handed, I shall not give any costs.

Proctors for the seamen, *Pritchard*; for the owners, *Rothery*.

THE "SANTIPORE."

THIS was a suit for salvage brought by the master, crew, and owners of the lugger "William and Mary," the lugger "Four Brothers," and the galley "Ned," and by the master, crew, and owners of the steam-vessel "Princess Mary," against the "Santipore," a barque of 515 tons.

The facts of the case are fully stated in the judgment.

The owners in defence alleged *that* the services of the several crews ceased upon the barque striking the main, and *that* they afterwards became tide-workers, for which they had all been paid at the rate of 4s. each per day, and 5s. each per night tide; *that* it was not owing to any services rendered by them that the barque was kept afloat or enabled to be removed from the rocks, and run on the beach; they denied *that* in consequence of any assistance rendered by the "Princess Mary" or otherwise the barque's cargo was preserved almost undamaged, and further alleged *that* the barque which, on her departure from London, was worth 8000*l.*, became a total wreck, and was completely broken up; *that* the chief part of her hull has since been sold by auction, and realised the sum of 140*l.* and no more; *that* the rest of the wreck will not realise, after payment of all expenses, more than 160*l.*; *that* the cargo was damaged to the extent of nearly three fourths its value; *that* for the reasons prealleged, the said steamer, "Princess Mary," rendered no salvage service whatever to the said barque, as she was unable to prevent her driving on the main, which resulted in the almost entire destruction of the said barque and her cargo, &c.

Sir *J. D. Harding* Q. A. and Dr. *Jenner*, argued the case for the luggers; Dr. *Deane* and Dr. *Bayford* for the steamer. Dr. *Addams* and Dr. *Twiss*, appeared for the owners, and admitted that a salvage service had been performed, though not to the extent alleged by the salvors, and left it to the discretion of the Court to award the amount of remuneration.

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THE
"ARABIA."
Judgment.

Wages forfeited for desertion are appropriated by 7 & 8 Vict. c. 112. s. 9.

THE HIGH
COURT OF
ADMIRALTY.

Feb. 7.

A valuable vessel having got upon the Church Rocks, off Folkestone, received assistance from some small boats, which were unable to get her off. A tug steamer having also tried in vain to tow her off, a large passenger steamer was sent from Folkestone Harbour, and succeeded in moving her from the rocks, and towing her for a few minutes, when the hawser having broken, she drifted ashore, and became a wreck. The cargo was saved to the value of 9657*l.* The defence that no salvage reward was due, as the service had been unsuccessful, not sustained. Award of 450*l.* to the smaller vessels, and 250*l.* to the steamer.

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 THE
 "SANTIPORK."

DR. LUSHINGTON expressed his satisfaction at the candid manner in which the case had been met by the owners, and deferred his judgment in order to give the case further consideration.

March 7.
 The circumstances of the case.

DR. LUSHINGTON delivered judgment. This is a case of salvage. The agreed value of the ship, freight, and cargo proceeded against is, 9657*l*. There have been two actions brought; the first, on behalf of the owners, masters, and crews of two luggers and one galley; and a second, on behalf of the owners, masters, and crew of a steam-vessel called the "Princess Mary."

There was much contradiction in the statements of the parties to this suit, and a mass of evidence conflicting in so many important particulars that it would have been a matter of no small difficulty to have arrived at a satisfactory conclusion; to have ascertained the exact truth, would have been a matter of impossibility. Among other questions not easy of solution would have been one arising from an alleged agreement; but from these difficulties I am happy to say, the Court is relieved by the candid and liberal line of conduct pursued on behalf of the owners. The Court has, therefore, only to decide on the amount of salvage remuneration to which the respective parties may be justly entitled.

The ship proceeded against is of 515 tons burthen, and, on her voyage from London to Van Diemen's Land, met with adverse winds going down the Channel, and was forced to put back. On the morning of the 5th of October, about five o'clock, she struck on the Church Rocks, near Folkestone; and, according to the protest, struck very heavily. The port bower anchor was let go, and she was by her canvas forced on the rocks, and at six floated. The wind blew hard and the sea ran high. The ship occasionally struck hard; the rudder gear was broken and cut adrift. At half-past six o'clock, the master sent ashore for a steamer, and employed twenty men to assist him. The port pump became useless, and though the others were constantly at work, there was four feet water in the hold. At noon the wind increased, and the sea ran tremendously, which caused the vessel to labour and strain violently. At a quarter past one, two steamers arrived; the first got hold, but the hawser parted; so did the second steamer; and as a last resource, they slipped from their anchora. The ship's head was canted to the eastward, and then the second hawser parted. In this critical position—I use the very words of the protest—they set the fore and aft sails; and a third steamer took hold, but

without effect—the steamer drifted. The ship took the ground, all the masts were cut away, and they commenced discharging the cargo, and, to steady the vessel, carried out a cable from the port quarter to the shore. Whilst the vessel lay in this position the cargo was discharged, the vessel herself was broken up, and sold for 140*l*.

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THE
"SANTIPONE."
Judgment.

This statement is a faithful abstract of the protest. The protest very clearly and decisively describes the danger which the ship was in ;—danger, indeed, so great, it ultimately ended in the destruction of the ship altogether. But as to the services of the salvors, whether small or great, this protest affords not even the slightest information. I think I scarcely ever read a document of this description which left the Court so completely and entirely in the dark, in this important particular, as this protest does. I must look, therefore, to other sources of information to ascertain the services which the salvors really did perform.

The protest contains an account of the ship's danger ; but more of the salvors' services.

The first set of salvors, the boatmen, represent that they experienced danger in going to and approaching the vessel, and they claim the merit of all that was done ; but this I consider to be very doubtful. The nearest the truth, perhaps, is, that they were very active in suggestion. The pumps were set to work, and at eight o'clock, they sent for a lugger. They state that they conveyed a passenger on shore, with considerable property ; this assertion is not well founded ; and that they brought back the ship's agent, Mr. Sisto, and that great danger was incurred in so doing. At half-past ten the lugger "William and Mary" arrived, and put more hands on board. Soon after this the ship's rudder was destroyed, and the starboard anchor let go. The "William and Mary," with the "Bright Star," were employed to await the arrival of a steam-tug, and to steer the vessel, if necessary ; they again took the agent on shore. At two a steam-vessel arrived from Folkestone ; great efforts were made to get a hawser on board, and this attempt, it was alleged, was attended with some danger. Who was employed in this the affidavit does not state ; I think it is fair to presume that the salvors were engaged in some part of the service. The Dover steam-tug arrived, and the salvors threw a line over her, but she did nothing. They then allege that, with imminent peril, they got a line over the South Eastern boat. Both anchors were let slip, and the steamer canted the ship's head round to the eastward, when the hawser broke. The jib was hoisted, and the ship run up as high as possible on the beach. The sails were cut away ; and there ended the service of these salvors.

Case of the first set of salvors.

The only question which appears to me to require investiga- This set of

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THE
"SANTIPORE."Judgment.
salvors in-
curred con-
siderable risk.Case of the
steamer.The endea-
vours of the
salvors were
only partly
successful, and
not of long
duration.Award of 450*l*.
to the boat's
crews.It is highly
important to
encourage the
services of
powerful
steamers.Award of 250*l*.
to the steamer.

tion as to this part of the case is, whether these services were attended with any, and what degree of danger; for, as we all know, that is a point of importance in every case of salvage. I am of opinion that it is proved, from the evidence, that these services were rendered at considerable risk to those concerned; at the same time, the risk has been portrayed in rather too glowing colours as to some parts of the case.

As to the claim of the steamer, Captain Hathorn, who is the superintendent of the steam-boats belonging to the South Eastern Company, very promptly and very properly took measures for affording assistance to this vessel. He telegraphed to Lloyd's, and took a message to Dover and Deal. He sent out the "Princess Mary," with twenty-seven men on board, as soon as the water in the harbour would allow; and, according to his statement, she was made fast to the "Santipore," and succeeded in getting her off the rocks, when, unfortunately, the tow-rope broke, and she went on shore. The merit of this service consists in having got the ship off the rocks, and so having contributed to the saving of the cargo.

These being the outlines of the case, I have now to consider what remuneration should be awarded, not forgetting that the endeavours were only partly successful; the ship was destroyed, and parts of the cargo damaged or lost to the owners. The first claim is on behalf of three small vessels and twenty-one men, and some damage has been done to one of the vessels. The service was not long, nor in itself very successful in the issue, but they rendered all the assistance their means would allow; and, as I think, with risk and danger to themselves. I shall allot to them the sum of 450*l*.

With respect to the steamers, I think Captain Hathorn's conduct was very praiseworthy; and I deem it of great importance — indeed, of first-rate importance — that sufficient inducement should be held out for the employment of such powerful vessels in services of this description — vessels which can render assistance when no others can. I shall give, looking at the value of the service, 250*l*.

In considering the difference, in point of amount, that I have awarded to these two sets of salvors, I do not shut my eyes to the fact that it may be true that, in moving the ship, the steamer, in reality, performed the more essential and important service; but it was not attended with risk or danger. All the hazard of life fell on the first set of salvors.

Proctors for the first set of salvors, *Gostling*; for the second, *Laurie*; and for the owners, *Deacon*.

RICHARDS *against* THE QUEEN'S PROCTOR.*On admission of Allegation.*

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PREROGATIVE
COURT OF
CANTERBURY.
Jan. 14.

ELIZABETH MARY BELL, spinster, the deceased in this cause, died on the 12th September, 1851, at the age of 82, leaving no known relation. Her property, entirely personal, amounted to about 1760*l*.

At her death three testamentary papers, all in her own handwriting, were found in a small box at her residence. They were to the following effect:—

No. 1. "To Thomas Vincent, Esq^r, of No. 16. Quebec Street, Hyde Park, my Executor, I leave the arrears of my Annuities, the unexpired Term of my long Annuities, and the Annuity for a term of 20 years from 1846. Also a sum of Money in the St. Martin's Saving Bank, to Pay the following Legacies:—To the Hospital for Consumptive Patients at Brompton, the Charity for Diseases of the Eye, and the Charity for Prevention of Cruelty to Animals, the sum of 30*l* each, to be paid out of the Money in the Saving Bank *—after all Expenses are paid. Debts I have none. I wish the Remainder to be divided Equally between the above Thomas Vincent, Esq^r, and his two Sisters, Eliza and Ann Vincent. And now my good and kind Friends, whose invariable kindness Has upheld me so many years, will Cause me to be Buried Respectable but Plain, and not Too soon. May the Almighty Bless you all.

"ELIZABETH MARY BELL.

"July 8, 1848, * and any other Legacy

I may add Hereafter.

"No. 2. Lower Phillimore Place,

"Kensington.

"ELIZABETH BENSON,

"JANE WELLER."

No. 2. "To my Executress, Eliza Richards, Wife of T. S. Richards, Esq^r, of No. 16. Quebec Street, Hyde Park. If at my Decease there should Remain any Unexpired Term of my Long Annuities, the Annuity for a Term of Years, Expiring in the year 1866, and the arrears of my Life Annuities, according to the Bond executed at the Time of Purchase, I leave to my Dear Friends, the above named Eliza Richards, to Be Divided Equally with her Sister, Ann Vincent. The sum of money in the St. Martin's Saving Bank, to Be Disposed of as Follows: to the Society for the Prevention of Cruelty to Animals, to the Charity for the Eyes, and to the Hospital for

In questions of revocation of a testamentary paper by a subsequent instrument, the main thing to be looked at is the intention of the testator. If a testamentary instrument contain no express revocation of former ones, the Court will not infer such revocation from the mere appointment of an executor in the subsequent one.

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 against
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 PROCTOR.

Consumptive Patients at Brompton, 30*l*. Pounds Each, and any Other Legacies I may wish to leave."

No. 3. (Paper A.). "To Smallwood Richards, Esq^r, my Executor, I leave 50 Pounds. To Watkins, Esq^r, of Sackville Street, Piccadilly, & Wilton Crescent, Knightsbridge, 50 Pounds. To Ann Vincent, Daughter of the late Thomas Vincent, Esq^r, I leave One hundred pounds. To the Fund for Prevention of Cruelty to Animals, to the Hospital at Brompton for the Consumptive Patients, to the Charity for Diseases of the Eye, Forty pounds each. To Frances Bowler, Widow, 55. Grove Place, Brompton, 10*l*. 0*s*. 0*d*. To Mary Clarah Price, of Decripy Place, Denmark Hill, Surry, 10*l*. 0*s*. 0*d*.

"ELIZ^m MARY BELL.

"Witness,

"JANE WELLER,

"2. Lower Phillimore Place,
 "Kensington.

"Witness, ELIZABETH BENSON,

"2. Lower Phillimore Place,
 "Kensington, Aug. 22. 1851."

Mr. Richards, finding these papers, assumed, as a matter of course, that the last operated as a revocation of that dated 8th July, 1848, and was alone the testatrix's will, and without mentioning, either to his solicitor or his proctor, that any other testamentary paper existed, on the 20th September, 1851, took probate of the latter paper only.

Miss Vincent, however, having been informed of the existence of the will of 8th July, 1848, under which she is named one of the residuary legatees, insisted that it ought to have been proved as the testatrix's will, and that the paper which had been proved as the will was only a codicil.

Mr. Richards, having taken counsel's opinion, brought the papers Nos. 1. and 2., and the probate of No. 3., into the Registry, with an affidavit of the circumstances; and, by his proctor, prayed the Court to revoke the probate already granted, and to grant probate of the two paper writings, dated respectively 8th July, 1848, and 22nd August, 1851, as the will and codicil of the deceased. The residue falling to the Crown under the last paper, the Queen's proctor declared he opposed script No. 1., being the will dated the 8th July, 1848. Mr. Richards, therefore, propounded it in allegation, consisting of ten articles, which pleaded in substance as follows:—

Allegation.

First. *That* the deceased died a spinster, without any known relation, and possessed of property to the amount of about 1760*l*.

Second. *That* she had for forty years before her death been

on intimate terms with Thomas Vincent and his sisters, and always expressed great affection for them.

Third. *That* in July, 1848, she drew up, in her own handwriting, and on the 8th of the said month duly executed, the paper writing No. 1., whereby she bequeathed, &c.; *that* the words "and any other legacy I may add hereafter," written at the foot of the said will, and a cross or mark written against the same, and also a similar cross or mark appearing in the said will, referring to and showing where such words were to be inserted, were written by the testatrix prior to the execution of her said will.

Fourth. Capacity.

Fifth. *That* Thomas Vincent died 11th September, 1849; *that* Eliza Vincent married Thomas Smallwood Richards 20th July, 1849, and died 20th July, 1851, leaving her sister, Ann Vincent, who is still living.

Sixth. *That* sometime between the 11th September, 1849, and the 20th July, 1851, but when more particularly is unknown, the deceased drew up and wrote the paper marked No. 2., but did not afterwards sign the same.

Seventh. *That* in the month of August, 1851, the deceased, having a mind and intention to make and execute a codicil to her said last will and testament, and thereby to appoint an executor of her said will in the place of the said Thomas Vincent, then deceased, and also to bequeath certain further legacies, in pursuance of her aforesaid intention to that effect, expressed and contained in her said will, did, with her own hand, draw up and write the paper writing now remaining in the Registry of this Court (and of which probate has been inadvertently taken as the last will of the said deceased); and *that* on or about the 22nd August, 1851, she did duly execute the same as and for a codicil to her said will; *that* the deceased, in and by her said codicil, appointed the said T. S. Richards (therein called Smallwood Richards) her executor; and thereby gave and bequeathed certain pecuniary legacies, but did not otherwise revoke or vary the provisions or bequests contained in the said will.

Eighth, ninth, and tenth. The finding and plight of the papers, the handwriting of the deceased, and the usual conclusion.

The admission of this allegation was opposed on behalf of the Crown.

Sir J. D. Harding Q. A. against its admission. This case may be decided, on the admission of the allegation, without the necessity of going to proof. It is purely a question of law,

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Allegation.

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 PROCTOR.

which the Court may decide from the papers themselves. I contend that, if this allegation were proved, the paper No. 1. would not be entitled to probate, but has been revoked by the latter paper, dated 22nd August, 1851. I rely upon the cases of *Henfrey v. Henfrey* (a) and *Plenty v. West*. (b) The appointment of Mr. Richards executor makes this a substantive will. In *Henfrey v. Henfrey*, Sir H. J. Fust says, "I have always understood that the appointment of executors was considered a gift to them of all the testator's property; here, by the latter paper, all is given to the widow; there was, therefore, no necessity to appoint executors. There is no case in which it has been held that where there are two wills, it is absolutely necessary that there should be a clause expressly revoking the appointment of executors, or that two substantive wills should be admitted to probate." That case was appealed and affirmed. On the appeal (c), Dr. Lushington expressed himself to a similar effect. In *Plenty v. West*, the learned Judge said, "There is no reference whatever to any earlier paper, nor did anything pass at the execution to show that the testator intended to limit the effect of the paper of 1838. I find, too, in a codicil of the same date as the will, there is an appointment of executors, which has always been considered to effect a complete disposition." (d) The present case is much stronger; there is no reference to a former paper, and there is an appointment of an executor. The appointment of executor, is just as if the testatrix had said, "I hereby bequeath to him all I may die possessed of." This is the force of the word as known to the law; and if persons use expressions well known to the law, they must be bound by them. The testatrix has clearly made a new and substantive will inconsistent with the former.

Dr. Jenner on the same side. The argument of the other side will rest upon the disposition of the residue in the former paper. But that argument fails, if we look more closely into the language of the paper. The residuary legatees are clearly tenants in common, so that by the death of two of them, in the lifetime of the testatrix, she is intestate as to two thirds of the residue. (e)

Dr. Haggard, *contra*. If Dr. Jenner's argument be correct, there is, in point of property, scarcely anything to contend for, as it is only one third of the residue. That, however, is a question for a Court of Equity, not of Probate. The rule applied before the year 1838 will here apply. We cannot deal with an unexecuted paper, but we may with a paper which is

(a) 2 Curt. 468.

(b) 1 Rob. 264.

(c) 4 Moo. P. C. 34.

(d) 1 Rob. 268.

(e) 2 Williams Executors, 1253-4.;
 2 Black. Com. 124.

incomplete as to the disposition of the residue. The cases cited have been treated with this view. The question was in those cases as in this, what the testator had himself recorded as his intention—what was the character which he intended to impress upon the paper. Those cases were very different. In *Henfrey v. Henfrey* the latter paper gave the whole property to the wife, and as the Judge said, there was no necessity to appoint executors. In *Plenty v. West* the testator described it as his “last will,” both at the commencement and in the attestation clause. In the present case an executor is appointed, because the executor named in the former will was dead, but there is here no disposition of the residue. Testatrix’s intention was, that the residue should go to Miss Vincent. It cannot be said that, because an executor is appointed, the whole of the residue is disposed of. He takes the legal, but not the beneficial interest. No argument against the paper can be drawn from the legacies; some are cumulative (*a*), and some are new legacies, according to the power which the testatrix intended to reserve to herself in the first paper. There is nothing whatever to show any intention, on the part of the testatrix, that the last paper should revoke the former.

Dr. *Twiss*, on the same side. Even if the present case could not easily be distinguished from the cases cited, there is a later case of the highest authority, which clearly lays down the law as applicable to such papers as those before the Court: *Stoddart v. Grant and Others*. (*b*)

Sir *J. D. Harding* Q. A. replied upon this case.

Judgment deferred.

SIR JOHN DODSON. In this case, Miss Elizabeth Bell is the deceased. She died upon the 12th of December, 1851, leaving personal property of the value of about 1752*l.*, and was of the age of eighty-two. She had no known relations, but she had been very intimate for forty years at least with a family of the name of Vincent, consisting of a brother and two sisters. Mr. Thomas Vincent, the brother, died on the 11th of September, 1849. Upon the 7th of July, 1849, Miss Elizabeth Vincent, one of the sisters, married Mr. Richards, who is the present party in the cause, and she died on the 20th of July, 1851. Ann Vincent, the other sister, is still living.

Three testamentary papers have been found, all in the handwriting of the deceased; and they were discovered in her repositories, being altogether in a box belonging to her. One

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The circumstances of the case.

(*a*) 2 Williams Executors, 1106.

(*b*) 1 Macq. Scot. App. Cas. 163.

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of these papers, which is before the Court, marked No. 1., bears date on the 8th of July, 1848; and it appears to have been duly executed by the deceased, and attested by two witnesses. It appoints Mr. Thomas Vincent, the party whom I have before mentioned, executor. No. 2. is a paper that is not signed or dated in any way whatever. The third paper before the Court is marked with the letter A, and bears date on the 22nd of August, 1851. That is duly executed and attested, and it appoints Mr. Richards the executor.

Now probate of the last paper only was taken out by Mr. Richards; and it is said that this was done inadvertently; that he proved that, as the only will of the deceased. It has since been brought in, and he now prays probate of paper No. 1., as containing the will, and this paper A. as a codicil thereto.

These several papers are before the Court; and the facts and circumstances to which I have just briefly adverted are set forth in an allegation, the admissibility of which is opposed by the *Queen's Proctor*. The party having died without any known relations, the *Queen's Proctor* has appeared, and opposed probate of this instrument.

Question is whether the last paper is a substantive will, or merely codicillary.

The question for the consideration of the Court is, whether, from the appearance and contents of the papers themselves, coupled with the facts stated in the allegation, the script A. being the last in point of date, is to be deemed a substantive will, revoking the other paper, or whether it is codicillary, and they are to be taken in conjunction with one another; in short, whether the two papers together are to operate, or whether probate is to be granted, as originally taken, of one paper only.

The Court must look to the intention of the testatrix.

Now this, I apprehend, must depend very much upon the intention of the testatrix. It is that to which the Court must look, to see whether it was really her intention that one of the papers only should operate as her last will, or whether it was her intention that the two papers should be taken conjointly as forming her will, or one being considered as the will, the other as a codicil to it.

The rule which is applicable to cases of this kind, I think, is laid down very clearly in the case cited by one of the learned counsel, namely, *Stoddart v. Grant and Others.* (a) That was a decision given by Lord *Truro*: he appears to have considered the point fully. Though that is a judgment upon a case of Scotch law and Scotch testamentary papers, still the principle is the same, because he refers to the opinions expressed by Lord *Moncrieff* and Lord *Murray*, who represent it to be a well-

(a) *Ubi supra.*

established principle of the laws of Scotland, that “where a deceased has left various writings, probative in themselves, for disposing of his property, they are to be understood as constituting one testamentary settlement, in so far as they have not been revoked, and are not inconsistent with each other.” (a) That is the rule of the law of Scotland;—they are to prevail, if they are not revoked, or if they are not inconsistent with each other. He says, “Lord *Moncrieff* and Lord *Murray* assent to the doctrine laid down by Mr. Justice *Williams*, in his *Law of Executors* (b), ‘that the mere fact of making a subsequent will does not work a total revocation of a prior one, unless the latter expressly revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so they be all testamentary, may be admitted to probate as together containing the last will of the deceased; and that, although one may be partially inconsistent with another of an earlier date, the latter instrument will revoke the former as to those parts only where they are inconsistent.’” The same learned Judges further observe, that “the main thing to be looked to is the intention of the testatrix.”

Then Lord *Truro* goes on to say, “The general rule applicable to cases of this description is perfectly clear, and not subject, so far as I am aware, to any exception. It is this: that questions relating to wills should be decided by looking to the whole contents of the documents, with a view to discover what is fairly to be inferred as the intention of the testator.”

Therefore, I now propose to look to these documents, to see whether I cannot infer from them what apparently and what really was the intention of the testatrix.

First, with regard to the paper marked No. 1., which is now propounded as the will, it is in these terms (c): “To Thomas Vincent,” &c. So that it appears from the addition which the testatrix made — “and any other legacy I may add hereafter,” — that at the time she was writing this instrument, she contemplated making some additional legacy — some additional appointment. The purport and tenor of that will is to give some legacy to three charities, which she mentions, namely, the hospital for consumptive patients, and another for the diseases of the eye, and the society for the prevention of cruelty to animals; reserving to herself the power of making any additional legacy which she may think proper; and then she disposes of

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(a) p. 170. (b) 1 Williams on Exrs. 116. (c) *Vide ante*, p. 235.

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The second
 paper clearly
 invalid.

the residue of her property amongst the family of the Vincents; namely, Mr. Thomas Vincent and his two sisters, Elizabeth and Ann.

The next paper,—at least, I presume the next, for there is no date to it, yet it is pretty clear from its contents that it is the next in order,—is No. 2. That has neither date nor signature, and therefore cannot at all affect the present question, which relates to No. 1. What I have now stated tends to show that it was an intermediate one; because I find it alleged in the allegation now offered, that Elizabeth Vincent, one of the residuary legatees named in the will, had, shortly after the making of that will, married Mr. Richards, and that then she died. It appears from the contents of this paper she was dead at the time it was written.

Now we come to the paper A., and it is in these terms: “To Smallwood Richards, my executor, I leave 50*l*. To — Watkins, Esq., of Sackville Street, Piccadilly, 50*l*. To Ann Vincent, daughter of the late Thomas Vincent, Esq., I leave 100*l*.”—(That is one of the original residuary legatees;—in the paper No. 1. she leaves her a legacy of 50*l*.)—“To the fund for the prevention of cruelty to animals, to the hospital at Brompton for the consumptive patients, to the charity for diseases of the eye, 40*l* each.” It will be recollected that in the first will she had left these charities 30*l*.; she had reserved the right of giving additional legacies, and here she gives them 40*l* each. Then it goes on to give a legacy of 10*l*. to Frances Bowler, widow, and also a legacy of 10*l*. to Mrs. Price. These are the contents of the instruments which are before the Court for its consideration.

There are no
 words of re-
 vocation in
 the last paper,

Now it is to be observed, in the first place, that there is nothing revocatory in the last paper at all; there is nothing about revoking all former papers, neither is there anything inconsistent, as it appears to me, with the contents of the former instrument. By that former instrument she had reserved the right of giving additional legacies. There was no occasion for that reservation, but it shows her intention. By this paper she gives additional legacies, legacies of 10*l*. each to two widows, and additional legacies to each of the three charities. A legacy of 50*l*. to Mr. Richards, her executor, and of 100*l*. to Miss Ann Vincent.

and nothing
 inconsistent in
 the disposi-
 tions.

It appears to me there is nothing whatever inconsistent in these dispositions. It is to be observed that the latter paper only gives these additional legacies, and there is no disposition of the residue beneficially for the interest of any person whatever. Looking, then, I think, to the intention of the testatrix,

it must be pretty clear that this was only following up her original intention, and she did not mean to revoke that first instrument. The residue of the property is still undisposed of altogether; for in consequence of the death of two of the residuary legatees out of three, two portions of the residue of the property of the deceased are undisposed of by either of the testamentary papers; and as there are no known relations who have been discovered, that will go for the benefit of the Crown.

Reference has been made by the learned counsel to two cases decided by the late Judge of the Prerogative Court, showing that these papers ought not to be taken in conjunction; those are the cases of *Henfrey v. Henfrey (a)*, and *Plenty v. West (b)*; but it appears to me that there is a very wide distinction between those two cases and the present. In one of those cases the instrument was described as the last will. "This is my last will and testament"; that was set forth at the commencement of the will. In the attestation clause, again, it was spoken of as the last will and testament, and there was a disposition of the entire property of the deceased; and clearly where there is a will described as the last will by the testator, and disposing of the whole of the property, that must be revocatory of any former instrument. It is said that one of them was not an absolute disposal of the property, but that it was disposed of by the appointment of an executor; that the appointment of an executor would always be considered as a conversion of the property; therefore, in point of fact, the whole of the property was disposed of by the last will. Here, again, it is said there is an executor; Mr. Richards is named as executor in the last paper, and therefore it must be considered that the whole of the property is given to him; that that will operate as a conversion of the whole property, consequently the entire property is disposed of, and it will operate as a revocation of the first instrument. But I cannot think it will have that effect,—that it will give him a legal interest by the lapse of a beneficial interest. What I have to look at is, the intention of the deceased. By appointing Mr. Richards executor, and giving him a legacy of 50*l*. for his trouble as executor, does she mean to confer upon him the whole of the property? Undoubtedly not; she never meant to take it away from parties who were beneficially interested under the other paper. True it is that two thirds have lapsed by the unfortunate death of the parties, but the great distinction adverted to between that case and the one now before the Court is, that it was described as the last will, and

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The residue
is still undis-
posed of as
to two thirds,
which falls
to the Crown.

The cases
cited do not
materially
affect the
question.

The appoint-
ment of an
executor gives
him no bene-
ficial interest
in the prop-
erty.

(a) 2 Curt. 468.

(b) 1 Rob. 264.

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The present
 instrument is
 not even de-
 scribed as a
 last will and
 testament.

The descrip-
 tion of a paper
 as a last will
 and testament
 is not conclu-
 sive evidence
 of its being
 revocatory of
 former instru-
 ments.

operated upon the whole of the property. In this case neither of these instruments is described as the last will; the learned Judge seems to think it conclusive upon all points that the last will would operate as a revocation of all former papers, and undoubtedly, generally speaking, it must do so. He said he was not aware of any case in which it had been otherwise held; and perhaps, at that time, there had been no case in which it was otherwise held. Generally speaking, when anybody describes an instrument as his last will and so forth, and makes an appointment of executors, that would necessarily operate as a revocation of all former instruments. This, however, is not described as the last will, but merely confers additional legacies, as the deceased had reserved to herself the right of doing under the former instrument, and substitutes another executor in consequence of the death of the executor named in the first will. There is no intimation of revoking the rest of the will, but merely the supply of defects in the legacies which she intended to give, and the appointment of an executor to carry her intentions into execution.

With regard to there being no case in which such a testamentary instrument as this has been described as the last will, and was not intended to revoke all former wills, in the very case mentioned of *Stoddart v. Grant*, one of the instruments was described as the last will. There were no less than seven; that was the fourth in point of order, and the testatrix there, whose name happened to be the same as this, *Bell*, describes it as the last will and testament; but notwithstanding that it was held by Lord *Truro* and the House of Lords, that it only formed part of the will, the other instruments were entitled to be proved; it did not revoke all former instruments. But then it was because it was not the intention of the deceased. Generally speaking, when persons describe a will as the last will and testament, they intend to revoke all former instruments, and, *primâ facie*, that must be taken to be so; but in this case of *Stoddart v. Grant*, that document, which was alone described as the last will, only gave a life interest in the household furniture to one of the servants, and nothing beyond it. Therefore, though she described it as the last will, it was only considered as part of the last will, and the three several papers prepared and signed by her before, as well as the three several papers afterwards prepared and executed by her, were all held entitled to probate.

Under these circumstances, I can have no hesitation in admitting the allegation to proof. I am clearly of opinion that it was not the intention of the deceased to revoke the instru-

ment, and that intention must be judged of, in cases of this kind, according to the rule laid down by Mr. Justice *Williams*. I am of opinion that the papers taken together are entitled to probate, that is, if the facts set forth in the allegation be proved. On that ground I admit the allegation.

Proctors, *Nicholl*, and the *Queen's Proctor*.

1854.
Judgment.

Allegation
admitted.

IN THE GOODS OF THE RT. HON. HENDRIK
JACOB BARON VAN DROM, DECEASED.

PATROON
COURT OF
CANTERBURY

Feb. 9.

THE Right Hon. Hendrik Jacob Baron van Drom, formerly of Middleburg, in Zeeland, but late of the Hague, died there on the 18th of January last, leaving a will duly executed according to the Dutch law.

Construction
of an executory
clause by the
Dutch law
adopted.

The appointment of executors was in words to this effect: "I desire that, in case at the time of my death all the persons having claims upon my estate shall not be present, in the house, my said son, and in the event of his absence, my son-in-law, M. Aert Van der Goes, and should he also be absent, my son-in-law, M. William Quartes Van Liffard, shall immediately act as executor, which executorship shall, however, cease as soon as all the persons having interest in my estate shall be present."

It appears that the testator's said son and sons-in-law were all present at his death, and that, according to the interpretation put upon the above appointment of executors by the Dutch law, they are executors without limitation, and that they are conjointly and separately, according to such law, qualified to administer all effects and moneys belonging to the testator as general executors. An affidavit as to the law and as to the due registering and proving of the will at the Hague, was made by a notary public there.

The said son and sons-in-law had been sworn as executors under a commission issued from this Court.

Dr. Hughes now moved the Court to decree probate of the said will, to issue to them as general executors accordingly.

SIR JOHN DODSON. There is no difficulty in the case. It is not necessary for me to put any construction upon the clause. It appears that, by the law of Holland, they are entitled to the administration of this estate, and the Court will adopt that construction.

Decree accordingly.

Proctor, *Toller*.

1854.

PREROGATIVE
COURT OF
CANTERBURY.

Feb. 9.

By the law of Scotland a widow is not entitled to any share of the property of her husband, or to letters of administration, unless at the time of his death she has been married to him one year and a day. Following a decree of the Commissary Court of Perthshire, the Court granted letters of administration to the sister of the deceased in preference to the widow.

IN THE GOODS OF THOMAS SHOOLBRAID,
DECEASED.

THE deceased, a quartermaster, on half-pay, of her Majesty's 45th regiment of foot, born, and domiciled at the time of his death, in Scotland, died on the 15th August, 1853, intestate, without a child, parent, or brother, leaving behind him Rachel Shoolbraid, otherwise Simpson (wife of John Simpson), his natural and lawful sister, and only next of kin, and also Mary Ann Miller, or Shoolbraid, his lawful widow and relict.

It appeared from affidavits brought in, *that* the deceased had married on the 1st of August, only fourteen days before his death, and *that* by the law of Scotland, a widow is cut off from any interest or participation in the property of her deceased husband, unless, at the time of his death, she shall have been married a year and a day; *that* the said Mary Ann Shoolbraid, the widow, had not alleged herself to be, and was believed not to be, *enciente*; *that* proceedings had been instituted before the Commissary Depute of the Commissariat of Perthshire, and *that* by his decree, bearing date the 16th November, 1853, he found that the said Rachel Shoolbraid, otherwise Simpson, as the next of kin of the said deceased, was entitled to be preferred to the office of executry, as executrix *dativæ, quæ*, nearest in kin to the said defunct Thomas Shoolbraid, in preference to Mrs. Mary Ann Miller, or Shoolbraid, as widow.

Dr. *Twiss* now moved the Court to decree letters of administration of the goods of the deceased to be granted to the said Rachel Shoolbraid, otherwise Simpson (wife of John Simpson), the natural and lawful sister, and only next of kin, and the sole person entitled, by the law of Scotland, to the personal effects of the said deceased.

SIR JOHN DODSON. I cannot understand why the Court should be asked to pronounce a decree so much more extensive than the decree of the Commissary Court of Scotland. That Court has decreed the administration to Mrs. Simpson as nearest of kin, or as next of kin; but I am asked to decree it to her as the only next of kin, and the sole person entitled to the personal effects of the deceased. Why should this Court take upon itself to do that which the Commissary Court has not done? The grant may pass to Mrs. Simpson, in this Court, under the same character and description as it passed in Scotland, but not otherwise.

Proctor, *Tebbs*.

IN THE GOODS OF WILLIAM BENNETT,
DECEASED.

THE deceased, late of Enfield Highway, in the county of Middlesex, builder, died on the 23rd January last, leaving a will, all in his own handwriting, and signed by himself, and apparently attested by two witnesses.

The signature and attestation appeared in the following form:—

“ Signed by Me WILLIAM BENNETT Testator this Day
5 of October 1853.

“ Witnessed by me CAROLINE BENNETT

“ Witnessed by me HENRY
CHAPMAN December 29. 1853.”

The attestation being imperfect, an affidavit of execution was required from the witnesses. It was to the following effect:—

“ Caroline Bennett, for herself, made oath *that* on the 5th day of October last the deceased signed his name at the foot or end of the said paper-writing, as the same now appears, as and for his last will and testament, in the presence of this deponent, no other person being present; *that* this deponent thereupon, at the request, and in the presence only of the said deceased, subscribed her name thereto as the same now appears. And the said Caroline Bennett and Henry Chapman further jointly made oath *that* on the 29th day of December last the said deceased, in the presence of both these deponents, present at the same time, produced the said paper-writing, and, referring thereto, said to the deponent, Henry Chapman, ‘ This is my will ; ’ and pointing to his said subscription, added, ‘ You see this is my writing ; I want you to put your name at the bottom ; ’ *that* the deponent Caroline Bennett thereupon pointed to her signature, and said, ‘ This is my signature ; ’ *that* the deponent, Henry Chapman, then, in the presence of the said Caroline Bennett, and of the said deceased, subscribed his name, as the same now appears, adding the words and figures, December 29. 1853.”

Counsel moved for probate.

SIR JOHN DODSON. The motion must, of course, be rejected. The will is invalid, as the first witness did not sign her name again, instead of only acknowledging her signature. (a)

Proctor, *Lochner*.

(a) This case is reported in the hope that attention may be drawn to the hardship of the law. In the year 1842 it was decided (*Moore v.*

King, 3 Curt. 243.), that a testator may have acknowledged his signature in the joint presence of two witnesses, and these witnesses may

1854.

PREROGATIVE
COURT OF
CANTERBURY.
Feb. 18.

W. B. wrote his will, signed it in the presence of C. B., who then subscribed. On a subsequent day W. B. acknowledged his signature in the presence of C. B. and H. C., and C. B. having also acknowledged her signature without resubscribing, H. C. subscribed his name. Will invalid, because C. B. did not sign again instead of acknowledging her signature.

1854.

PRIVY
COUNCIL.

Nullity. Malformation. A husband having been about eighteen years married, and having constantly cohabited with his wife for several years, instituted a suit for nullity by reason of the incurable malformation of the wife.

Held: 1st. That time alone will not, but, coupled with other facts proving insincerity, will operate as a bar to such a suit. 2nd. That lapse of time must be accounted for.

3rd. That the evidence in the present case did not sufficiently account for lapse of time, but showed partial connection to have taken place between the parties, and that the suit was instituted *alie iudicio*. 4th. That, under the whole circumstances of the case, the husband was not entitled to a decree of nullity.

B—N against B—N.

THIS was a cause or business of nullity of marriage, brought by A. B—, Esq., against L. H. W. M—e, falsely calling herself B—n, and pretending to be the wife of the said A. B—n, by reason of the natural and incurable malformation of the parts of generation of the said L. H. W. M—e.

The suit commenced in the Consistory Court of London, where a libel was brought in on the 3rd of September, 1852, which pleaded in substance:—

First and second Articles. The celebration of the marriage at Belgaum, in the East Indies, on the 26th of June, 1835.

Third and fourth. *That* the parties cohabited as husband and wife (save that the said marriage in fact was never consummated) till June, 1840, when the said L. H. W. M. came to England for the benefit of her health, under medical advice; *that* the said A. B. being in the civil service of the East India Company, continued resident in the East Indies until March, 1844, when he returned to England on leave, and arrived there May 31st, in that year; *that* he immediately rejoined the said

have subscribed their names in the presence of the testator precisely as in the present case, and yet that the will is invalid under the statute because one of the witnesses signed his name in attestation of the testator's signature *before the testator acknowledged such signature in the joint presence of the two witnesses, and that after such acknowledgment the first witness only acknowledged his signature instead of resubscribing the will.* The will is invalid because the first witness did not sign her name to the will *twice*.

It may be doubted whether the wording of the law and not the intention of the Legislature has not excluded such wills from probate, because we find the recommendation of the Real Property Commissioners, upon which the law of execution was founded, to this effect: "We therefore propose that every will should be signed by the testator in the presence of, or the signature acknowledged to, two witnesses present at one time; and that they should subscribe their names in the presence

of each other, or that *one having signed first, should acknowledge his signature and be present when the attestation is signed by the other.*" (4 Rep. R. P. C. 18.)

Here we have their object and intention plainly and fully expressed; but they seem to a certain extent to have defeated it by the consciousness with which they afterwards (p. 80.) expressed their propositions for alterations of the law, viz. "that the signature shall be made or acknowledged by the testator in the presence of two or more credible witnesses *present at one time, who subscribe their names to the will.*"

Now it is plain that the sole object of the Commissioners in the words "witnesses present at one time, who subscribe their names to the will" was a *simultaneous acknowledgment* to the witnesses, and *not a simultaneous subscription of the witnesses*, provided they acknowledged their signatures to each other; so that by the Commissioners such wills as *King's* and *Beasell's* would not have been invalidated.

L. H. W. M., and cohabited with her at various places until the summer of the year 1845, when he finally separated himself from her.

Fifth and sixth. *That* the marriage was never consummated, by reason of the malformation of the lady, and that the same was incurable, and not to be remedied or removed by art.

Seventh. *That* the said A. B. soon became aware that the parts, &c., were in such a state as to prevent the consummation of their said marriage; but *that* he was not aware, until he became so as and at the period hereinafter pleaded, *that* such the obstacle to its consummation was incurable or irremediable; *that* from the summer of 1845, until November, 1847, when his leave of absence expired, he was compelled to and did travel about in England, Scotland, and Ireland, for his own health; *that* in November, 1847, he quitted England for the East Indies, where he continued discharging his official duties until the beginning of the year 1852, when, having again obtained leave of absence, he arrived in England in the month of April; *that* it was only since such his return to England that he became aware, to wit, from the information of one or more medical practitioner or practitioners whom the said L. H. W. M. had consulted from time to time, and to whose inspection she had submitted her person, in respect to her aforesaid malformation and consequent impotency or incapability, that the same were not to be removed or remedied by art, but were absolutely incurable, and which information so obtained hath led to the institution of this suit.

Eighth. Pleaded confessions of the said L. H. W. M.

Ninth, tenth, and eleventh. Pleaded the jurisdiction, &c.

The admission of this libel was opposed upon the ground that the great lapse of time between the marriage, in 1835, and the institution of the suit, in 1852, itself constituted a bar to the suit.

Dr. Haggard and Dr. R. Phillimore, in opposition to the libel, cited *Norton v. Seton* (a), *Mortimer v. Mortimer* (b), *Guest v. Shipley* (c), *Harris v. Ball* (d), *Briggs v. Morgan*. (e)

Dr. Addams and Dr. Twiss, in support of the libel, cited *D——e v. A——g*. (f)

DR. LUSHINGTON admitted the libel, and delivered the following judgment:—

This is a suit brought by the husband against the wife, seeking to have a fact of marriage, had in the year 1835, pronounced

1854.
B——n
against
B——n.
The Libel.

Dec. 16. 1852.

Judgment in
the Consistory
Court.

(a) 3 Phill. 168.

(b) 2 Hag. Cons. 312.

(c) Ibid. p. 321.

(d) 3 Phill. 155.

(e) Ibid. p. 325.

(f) 1 Robt. 279.

1854.

B—N
against
B—N.

null and void, by reason of a natural and incurable malformation of her sexual organs, which existed at the date of their marriage.

Almost all Judges have expressed their extreme annoyance in having had to deal with suits of this nature, and of all no one had so strong an aversion as the late Sir *John Nicholl*; still, when such suits were rightly brought, they have considered themselves bound to give them due attention.

It is a mistake to assert that Ecclesiastical Courts annul marriages in cases like the present, for these marriages are in themselves, *ab initio*, void. There is no injury to complain of when the marriage is pronounced null and void; the injury had been previously inflicted by one or other of the parties; sometimes, perhaps, knowingly; sometimes in utter ignorance of his or her state at the date of the marriage.

The objection raised against the admission of this libel has been confined to a single point, namely, the length of time which has elapsed between the marriage and the institution of this suit. The questions, however, which I must consider are: 1st. Whether delay is itself an absolute bar? And if not, 2nd. If a bar when not accounted for, whether circumstances are not alleged in this case so as to prevent time operating as a bar?

I confess, when I at first read over the papers, I felt some difficulty respecting time forming a bar to a suit of this nature. I must recollect, however, that the Consistorial Courts, as well as the Court of Arches, are Courts of Law, and not Courts of Equity, and that I nowhere find time prescribed, or rules laid down respecting lapse of time. No instance has been mentioned to me in which a Judge has said a particular number of years constitutes a bar; and I cannot discover that when a suit, like the present, has terminated unfavourably to the promoter, there were not other circumstances, besides the question of time, co-operating. It is manifest that the case of *Harris v. Ball*, much relied on in argument, was not decided on the question of time; the exact ground on which the Court of Delegates dismissed that suit appears in a note to *Norton v. Seton*. (a)

Having, then, no precise authority for my guide I am placed in some difficulty; still, I think I should be placing myself in much greater difficulty, and opening the door to uncertainty, if I attempted to define what would constitute a bar. Supposing I were to fix on seven years, why should not six and a half equally prevail? On the other hand, were I to say that seven were not a bar, why should eight constitute one? I think it must be obvious that to introduce, as it were, a Statute of Limitations, where none exists, would be vain. It is not competent,

however, for me to say that, looking at certain *dicta* of Lord *Stowell* and Sir *John Nicholl*, time may not form an element in some cases; nevertheless, I repeat, there is no authority with which I am acquainted for saying that time *alone* will constitute a bar.

1854.
B—N
against
B—N.

There is, undoubtedly, a wide distinction between a suit like the present and a suit for divorce by reason of adultery. In the latter, delay in instituting a suit after the ground of complaint has become known is an important ingredient; and, were it not so regarded, great injustice might accrue to the defendant by rendering that party incapable of disproving the charge, or of establishing that which would be in law a just defence—whether a counter charge of adultery, or of acquiescence in the offence committed. On the other hand, in suits of a like nature with the present, no such injury can result; the proofs are of a totally different character; they must be by ocular inspection. In short, there is no similarity between the two.

Assuming, however, that mere delay unaccounted for would be an obstacle, I proceed, in the second place, to consider whether any and what circumstances are alleged in this libel to account for delay in instituting this suit.

It appears that the marriage took place in India, where the parties cohabited for five years, namely, until June, 1840, and that there is nothing whatever in their respective ages, at the date of the marriage, to make the observations of Lord *Stowell*, in the case of *Briggs v. Morgan* (a), here applicable. I never could hold five years to be a bar, *à fortiori*, when the cohabitation has been in India, for there are not the same means in that country for making inquiry and of obtaining advice as exist in England. To proceed with the facts: it appears that the lady came to this country in 1840; that she was joined by her husband in 1844; that they cohabited, at intervals, in the course of a twelvemonth; that in 1847 he went back to India, leaving his wife in England, and, lastly, returned to this country in April, 1852. Taking this statement to be true, I must observe that it is to be lamented that the husband did not adopt some means in the interval, between 1844 and 1847, when he had full opportunity to ascertain the true condition of his wife; he was aware, at an early stage of their cohabitation, that there was something wrong; nevertheless, he did not satisfy himself of her alleged incurable condition until the present year. There is some blame for this delay, still I must recollect that when in India he was placed in difficulty; he had not the same facility for obtaining advice as he would have had in this

(a) 2 Hag. Cons. 330.

1854.

B—x
against
B—x.

country. After a due consideration of the question raised on argument, and bearing in mind that I know of no authority for saying that delay *alone* in instituting such a suit would be a bar, though, if a bar, the lapse of time is partially accounted for, I have come to the conclusion that I should not be acting rightly were I to prevent the husband the opportunity of establishing his case. I therefore admit the libel.

Jan. 27. 1853.

From this decision an appeal was prosecuted in the Arches Court of Canterbury, where SIR JOHN DODSON affirmed the judgment of the Consistory Court.

Judgment in
the Arches
Court.

After stating the facts of the case the learned Judge proceeded. The objection taken to the admission of this libel was solely on the ground of delay on the husband's part in instituting the suit, but the learned Judge of the Court below overruled that objection; the question which I have to determine is, whether his decision is well founded.

I may observe, in the outset, I do not discover on the face of the libel any reason to suspect fraud or insincerity. The sole question is, whether, after such an interval as has occurred between the marriage and the separation, the husband is entitled to his prayer.

It was not pretended to be asserted at the bar that any statutable limitation on such a suit as the present exists. I was not referred to any authority, either from the general Canon Law or any text writer, to make good the assertion that delay, *per se*, will operate as a bar; in fact, it was admitted that the question is one *primæ impressionis*. However, certain cases were mentioned which were supposed to furnish some analogy; but, to my mind, I must confess they had little or no bearing, more especially those cited from the *Admiralty Reports*, inasmuch as the Judge of that Court has, by his commission, an *equitable* jurisdiction, which this Court does not possess. Some decisions in this and the Consistorial Court were referred to, which it is necessary for me to examine.

The case of *Harris v. Ball*, not reported, is thus mentioned and observed upon by Sir John Nicholl in his judgment in *Norton v. Seton* (a): "The lapse of time may act as an absolute bar to the suit not brought by the party injured. In *Ball v. Ball* it was so held by the Delegates." This passage was cited by counsel to show that delay is an ingredient in such a case as the present; but I confess I cannot understand the passage after looking at the facts of that case as stated; there must be some mistake in the report. It appears, at pp. 155,

1854.
 B — N
 against
 B — N.

156., that, after a cohabitation of seven years, the suit was instituted by the wife, the party *injured*; that her libel was *admitted* by the delegates, and evidence taken thereon; that the ground of their decision against the wife was *not* by reason of delay in instituting the suit, but from the circumstance of her having "*totally failed in the proof of her libel.*" In fact, then, time—delay—was *not* the point, but defective proof. The case, therefore, of *Harris v. Ball* is not an authority for the present purpose.

The next case cited was *Guest v. Shipley*. (a) The parties were married in 1813, and the suit was instituted in 1820 on the part of the husband against the wife; but on a perusal of the judgment, it is evident the decision was not founded on *delay*. The principal feature of that case was that, in a suit for adultery brought by Mrs. Guest two years after her marriage, Mr. Guest had himself confessed the validity of the marriage. Lord *Stowell* dwelt on that admission, and took into account the conduct of the husband as established by his own letters. It appears that the wife was possessed of separate property, and that the husband's letters furnished proof of an attempt to extort money. Though in the course of the judgment his Lordship did say, "But the length of time which has elapsed, is in itself almost a bar," he did not go the length of saying that delay *per se* would constitute a bar. It is clear to me that, in the conclusion arrived at in that case by the Court, the question of delay did not form a feature. The sentence was given in favour of Mrs. Guest on the grounds that her husband had, on a previous occasion, admitted the validity of the marriage, and showed, by his conduct, that the suit of nullity was instituted with the view to extort money.

I will now proceed to examine the main circumstances of the case of *Briggs v. Morgan* (b), which was also cited. In the original libel given in sixteen months after the marriage, the ages of the parties were not stated, and that circumstance Lord *Stowell* considered, in such a suit, to be an important omission. Subsequently it turned out that in the year 1818, when the marriage took place, the woman was *a widow of fifty years of age*, and the man forty-two, and that she had been the *wife of a former husband for eighteen years*. His Lordship observed, that "different considerations have been applied to persons of advanced age and to those of an earlier period of life with great reason and propriety. In the case of young persons, the injury is greater; in age more advanced, the mode of inquiry is less conclusive" "the woman was fifty years of age at

(a) 2 Hag. Cons. 321.

(b) 2 Hag. Cons. 328.

1854.

B—*n*
against
B—*n*.

the time of this marriage, rather beyond the crisis when the expectation of children can reasonably be entertained, and more particularly in the case of a woman who had been married many years before, and had no children. The age of the man is not much a subject of observation, except that it is beyond the *octavum lustrum*, at which an experienced writer describes the passions to be in a state of greater composure; at any rate, it is an age at which the disappointment on that account may be presumed less grievous, especially in the case of a marriage to a woman older than himself. This is not the only symptom of insincerity in the present complaint. There is the delay of sixteen months, which is not easily accounted for, in a case in which the proof of continued cohabitation is not required; for in the case of actual malconformation, no such proof is required. The party, according to his own description of the case, might have made his application at a much earlier period. The proofs of an *effective* cohabitation with the former husband are clear and strong, both by the affidavit of the laundress, and of other persons; and if the Court is not deceived in the inferences to be drawn from them, it cannot be, as it is alleged, a case of natural malconformation." The learned Judge, after having observed on other features of insincerity in the case, then said, "Under such circumstances, the Court will not think itself justified in exposing a woman of this advanced age to the only proofs, certainly of an offensive nature, by which the alleged defect can be satisfactorily established." It is clear, from the report of the above case, that Lord *Stowell* did not consider the delay in instituting the suit an obstacle; he was at first disposed to admit the libel, but ultimately rejected it; principally on account of the advanced age of the woman, and some features of insincerity manifested by the husband.

I do not consider it necessary to travel through the case of *Norton v. Seton*. (a) It is sufficient to say that it was a suit in which the husband, the party complaining, alleged his own impotency, though by the Canon Law that circumstance may not be an obstacle to the suit, provided the complaining party was, at the date of the marriage, *ignorant* of the defect; still if the marriage be contracted *scienter*, as Sir *John Nicholl*, in *Norton v. Seton*, considered to be the case, the party will not be permitted to take advantage of his own fraud.

In no one of the cases which I have examined do I find that the decision turned on the question of delay in instituting the suit, though in two of these cases there had been a cohabitation for seven years. In the present suit there was certainly a con-

tinuous cohabitation for five years between 1835 and 1840; but it is to be observed that that occurred in a part of the world where, in all probability, satisfactory medical advice on such a case could not easily be had. The cohabitation was then interrupted till May, 1844, when it was renewed for a small period under the circumstances stated in the libel; the parties finally separated in 1845; the husband afterwards went back to India, and did not return to this country until early in the year 1852, when he, as he states, for the first time obtained information of the condition of his wife. If any fact set forth in the libel be misstated, it may be counterpleaded by the wife. In the present state of the law the truth of the facts may be easily ascertained, since, for anything that I know to the contrary, both husband and wife may be examined as witnesses in this case.

After a consideration of all the facts set forth, I am of opinion that, as no authority has been discovered for saying that lapse of time alone is a bar to such a suit, I cannot reject this libel. I will not, however, go the length of saying that in no case can delay operate as a bar; but I say that as there is no obstacle arising from the respective ages of the parties, and nothing in the conduct of the husband to lead me to question his sincerity, I should not be warranted, under all the circumstances stated in this case, in rejecting the libel.

From this judgment an appeal was prosecuted to the Judicial Committee of the Privy Council, when their Lordships, after hearing counsel, were pleased to declare that they would not then express any opinion as to the very important point of law raised in the case; but, desiring to have the case more fully before them, they would admit the libel for that purpose only, retaining the cause, but reserving to the appellant at the future hearing the full benefit of the point of law. April 13. 1853.

The libel having been admitted, two witnesses were examined to prove the fact of marriage and cohabitation; and Dr. Lowch, Dr. Ferguson, and Mr. Partridge, having been appointed the medical inspectors, made their report, and were also examined upon the sixth article, and interrogatories were administered to them.

An allegation was then given in and admitted without opposition on behalf of Mrs. B. to the following effect:—

The first and second articles pleaded,—actual consummation of the marriage, and also conversation and correspondence between Mr. and Mrs. B. respecting her being or becoming in the family way. Allegation on behalf of the wife.

1854.
B—n
against
B—n.

1854.

B—N
against
B—N.

Third. Exhibited three letters from Mr. B. to his wife, dated respectively in 1837, 1839, and 1840.

Fourth. *That* Mrs. B. being disappointed at not becoming pregnant, with the consent of her husband consulted a surgeon in great practice in Belgaum; *that* Mr. B. never suggested that his wife was formed differently to other women, nor proposed that she should consult any medical man as to any possible malformation, nor himself made inquiry relative thereto, and *that* the said surgeon prescribed for Mrs. B., and held out expectations that she would become pregnant.

Fifth. *That* when Mrs. B. quitted India for England in 1840 for the benefit of her health, Mr. B. promised, and intended, to join her in England in the course of the ensuing year, but was subsequently induced, by the state of his own health, and by a new appointment in the service of the East India Company, to change his intentions in that respect; and in order to reconcile his wife to such change in his plans, wrote a letter, dated July 15. 1841, and *that*, accordingly, he did not rejoin her until May, 1844. *That* during the whole of such his separation from her, Mr. B. corresponded with her, though after a time in terms of diminished affection, insomuch that he threatened not to live with her in England, *on the ground of an alleged incompatibility in their tempers.*

Sixth. Exhibited fifteen letters from Mr. B. to his wife, dated in the years 1837, 1840, 1841, 1842, 1843, and 1844.

Seventh. *That* a few months after Mr. B. had rejoined his wife in May or June, 1844, and renewed his cohabitation with her, he revived the suggestion that they should live separate, *on the ground of incompatibility in their respective tempers*; and he wrote certain letters to her, insisting that an arrangement should be entered into for that object, which was most reluctantly assented to by her. *That* in pursuance of such arrangement, Mr. B. made his wife a stipulated allowance for her maintenance, and paid her frequent visits for a few days at a time.

Eighth. Exhibited five letters from Mr. B. to his wife, written in the month of October, 1844.

Ninth. *That* the last occasion of Mr. B. so visiting his wife was in April, 1846, when he cohabited with her for a few days, promising to repeat the visit in a month's time, but *that* he never afterwards saw her, and from that time almost wholly ceased to write to her, or to have any communication with her, direct or indirect. *That* on the said last visit, and on all other occasions of his being with her after his return from India, he lived and cohabited with her as his wife, and constantly had

sexual intercourse with her, and never on any occasion complained to her that he was unable, &c.

Tenth. Exhibited six letters, dated about 1845 and 1846.

Eleventh. Counterpleaded the seventh article of the libel, and pleaded *that* some little while after Mrs. B.'s arrival in England in 1840, she consulted one or more medical practitioners as to the cause of her not bearing children, and then, for the first time, submitted her person to their examination; *that* the fact of her having so done was communicated by her to her husband in letters despatched to him in April and May, 1841, and duly received by him in India. *That* Mr. B. did not on any occasion during the time he was in England in 1844—7, nor on any other occasion, until the issue of the citation in this cause, suggest that Mrs. B. should consult medical men as to any possible malformation, or submit her person for such purpose to their examination; *that* since April, 1841, until after the issue of the citation, Mrs. B. never so submitted her person.

Twelfth. Pleads the exhibits to be in the handwriting of Mr. B.

Mr. B. having admitted the letters, no witnesses were examined on this allegation.

The report of the three medical inspectors was to the effect "that the external organs of generation of Mrs. B. are normal, but that the vagina is an imperforate canal, capacious in width, but only of about one third of the ordinary length; that there is no uterus to be detected, and that the parts of generation are only capable of sexual intercourse to a limited and imperfect extent; also that this is a state of congenital sterility not removable by art."

Their evidence on the sixth article was to a similar effect, but "that Mrs. B. was capable of an *imperfect* sexual intercourse; that such had taken place to a considerable extent; and that she was consequently no longer a virgin, though she was irretrievably incapable of conception."

The case was argued upon the evidence before the Judicial Committee by Dr. Addams and Dr. Twiss for the husband, and Dr. Haggard and Dr. R. Phillimore for the wife. Dec. 16 & 17.

Their Lordships (a) reserved their judgment.

DR. LUSHINGTON delivered the judgment of their Lordships. This suit commenced in the Consistory Court of Lon- Feb 25.
Judgment.
Circumstances
of the case.

(a) Lord Justice Knight Bruce, Leigh, Sir John Dodson, and Dr. Lord Justice Turner, Sir John Patteson, Sir E. Ryan, Mr. Pemberton Lushington.

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don in the year 1852; it was brought by Mr. B—n against his wife, whose name before the marriage was L. H. W. M., and the object of the proceeding was to have the marriage solemnised between the parties in 1835 declared null and void, *ab initio*, by reason of the natural and incurable malformation of the parts of generation of the lady.

In the Consistory Court a libel according to the usual course was brought in on behalf of Mr. B., the admission of which was opposed.

The leading facts set forth in that libel must be stated. It appears that prior to the marriage the parties in this cause were resident in India, Mr. B. being in the civil service of the East India Company, and the lady being the daughter of a colonel in the company's army.

The libel pleads that the fact of the marriage took place in June, 1835, at Balgaum, within the Presidency of Bombay; that the parties lived together at Balgaum till June, 1840, when Mrs. B. came to England for the benefit of her health; that Mr. B. remained in the East till March, 1844, when, having obtained leave of absence, he left India and reached England at the end of May in that year; during the remainder of that year and till the summer of 1845, the parties occasionally lived together, but it is pleaded that at the period last mentioned Mr. B. finally separated from his wife.

The fifth and sixth articles plead the malformation. The seventh alleges that though Mr. B. soon became aware that the malformation of his wife prevented consummation, yet that he did not know that such defect was incurable till the year 1852, when he was informed by medical practitioners who had been consulted by his wife and had inspected her person.

The admission of this libel was opposed, but after debate it was admitted by the Court on the 16th of December, 1852. The cause was then appealed to the Arches Court, where the judgment of the Court below was affirmed.

An appeal was afterwards brought before the Judicial Committee, when their Lordships thought fit to declare that they would not then express any opinion as to the very important point of law raised in the case, but would admit the libel and retain the cause, reserving to the appellant at the future hearing the full benefit of the point of law.

It may be convenient to refer to what is the usual rule and practice of the Ecclesiastical Courts in Doctors Commons on the admission of libels in matrimonial causes. Such pleas always contain statements of law and of facts; and unless it be perfectly clear on the face of such plea that the party pro-

Practice of
 Ecclesiastical
 Courts in ma-
 trimonial suits
 to admit the
 libel, unless it
 is perfectly

ceeding cannot succeed, the Court admits the libel, but it does not, by so doing, bind itself in any way to pronounce finally in favour of the plaintiffs. All it decides is, that the case is a fit case for further consideration, and that the party ought not to be estopped in that stage. The Court reserves to itself to consider the whole case — both law and facts — when the evidence has been taken.

The cause having been retained, evidence was taken on the libel, and subsequently Mrs. B. gave in an allegation which was admitted without opposition. Mr. B.'s answers were taken to this allegation, and these answers admitted the letters annexed to it.

The cause, therefore, has been heard on the evidence taken upon the libel on Mr. B.'s answers, and the letters admitted by these answers.

Two questions arise for the consideration of their Lordships. 1st. Whether any circumstances are proved by the evidence, which ought, in justice and law, to estop Mr. B. from any remedy, even supposing his complaint to be well founded. And, 2ndly. Whether the main averments in the libel, with regard to Mrs. B., are established by competent proof.

We will address ourselves to the first question. It may be put in this form: whether a party proceeding in a suit to have a marriage declared null and void by reason of malconformation, may not be barred from succeeding in his suit, *personali exceptione*; that, is by his own condition independent of his own conduct, or by his own conduct.

This doctrine is familiar both to the Civil and Canon Law, more especially to the latter, in matrimonial causes, it being a received maxim in such causes, that the party seeking relief, however well founded his ground of complaint may be against his consort, must show that, by his own conduct, by his own sense of injury, and his own vigilance, he is justly entitled to relief from the Court.

We will consider this subject both on principle and authority.

Without entering into any minute discussion as to all the purposes for which marriage was intended, it is obvious that the capacity for sexual intercourse is, in all cases, save when age may seem to preclude it, to be deemed a most important essential; essential, because the procreation of children is one of the chief objects of marriage; essential, because the lawful indulgence of the passions is the best protection against illicit intercourse; and to these considerations may be added the well-known fact that, in most cases where the incapacity is on the

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clear upon the face of it that the party cannot succeed. The Court is not thereby precluded from considering the law in conjunction with the facts proved in evidence.

Two questions. — 1st. Are there any circumstances to estop the husband from his remedy, if his complaint be well founded? 2nd. Is his complaint, as regards his wife, established by competent proof?

The doctrine of bar, *personali exceptione*, is familiar to the Civil and Common Law, especially in matrimonial suits.

When the purposes of marriage are defeated by impotency on either side, the law provides a remedy, according to the circumstances of the case.

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side of the husband, the health of the wife cannot escape serious injury.

When, therefore, a party is really aggrieved on account of those consequences, the law affords a remedy ; a remedy according to the circumstances of the case. In the case of the husband, he is at liberty to resort to the Court as soon as he discovers that his wife, from malconformation, is incapable of sexual intercourse. In the case of the wife being the complainant, she has the same remedy in a similar case ; if, indeed, the incapacity be *propter frigiditatem*, the law requires, before such a suit be commenced, a sufficient cohabitation to establish the fact.

Their Lordships cannot lay down any rule as to the operation of time alone as a bar to a suit of nullity by reason of malformation ;

The cases of malformation are so various in their circumstances, the degrees of malformation which prevent or impede sexual intercourse sometimes are so difficult of ascertainment, the proof that the impediment is incapable of removal occasionally so uncertain, that their Lordships would be unwilling to lay down any rule, as to the operation of time alone, as a bar to the commencement of a suit of this description. It might be that there was a difficulty in ascertaining the defect itself, in obtaining medical evidence that it was incurable ; a fact, sometimes not to be ascertained save by operation. Other circumstances, too, might concur to account for lapse of time, and to excuse a husband from apparent delay in the commencement of a suit ; but lapse of time, coupled with other circumstances, is manifestly of great importance ; that very lapse of time may be most injurious to the wife. The consequences of the dissolution of the marriage bond to the wife, unconscious of her own defect, as is most frequently the case, are necessarily most painful ; a proclamation of that defect is made to the world, her *status* is destroyed, and should unnecessary delay occur, not only are these consequences aggravated, but parents and relations may have died in the interim, who, had the suit been brought earlier, would have sustained her in her trials, and secured to her a home.

but they consider lapse of time, coupled with other circumstances, of great importance.

It is obvious, for these reasons, that time, though not in itself, under ordinary circumstances, a bar, yet, especially when the lapse has been very considerable, is not an unimportant matter in suits of this description, and more particularly as concerns the wife.

The law gives a remedy *vigilantibus non dormientibus*.

In other respects, too, as relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only *vigilantibus non dormientibus*. The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that

the presumption would necessarily arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, "Give me a remedy for a grievance I have not felt," and that to the detriment of another.

Their Lordships are all of opinion that cases might occur where long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such a suit, and, more especially, if the circumstances showed that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons.

The authorities with regard to lapse of time and the effects thereof are few, and these suits, till of recent years, have been so rare, that it was highly improbable that much could be found on this head. As might be expected, these authorities do not specify any particular lapse of time since the marriage, as forming a bar to the institution of a suit of nullity, and for very obvious reasons. In almost every case falling within this category, the circumstances differ; in some cases the delay may be satisfactorily accounted for, though apparently of long duration; in others, though the lapse of time may have been of briefer duration, no reasonable cause for not commencing the suit earlier may appear. The result of all the cases about to be cited, will show that great delay in the institution of a suit of this description by the husband has always been considered an objection to be accounted for.

In the case of *Guest against Guest* (a), Lord *Stowell* thus expressed his opinion:—"The length of time which has elapsed is, in itself, almost a bar, for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval. That a period of seven years should be allowed to elapse in a case, where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted."

It is true that in that case Lord *Stowell* held the suit to be barred on another and a totally different ground,—namely, that in a previous suit for separation, on account of adultery, brought by the wife, the husband had admitted the marriage,—still, though not a decision, it is the expression of an opinion from the highest authority, and is justly entitled to great weight.

Again, in the case of *Briggs against Morgan* (b), Lord *Stowell*, though the case was not decided on that ground, declared his opinion that a delay of even sixteen months, unaccounted for, was a proof of insincerity.

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Long acquiescence with knowledge would, in some cases, operate as a bar to such a suit, especially if it seemed instituted *alio intuitu*.

The authorities upon the point show that great delay by the husband has always been considered an objection to be accounted for.

(a) 2 Hag. Con. 323.

(b) 2 Hag. Con. 329.

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 Judgment.

Present question, Is the lapse of time, accompanied with other facts, which prove the insincerity of the husband?

Though the husband was aware of the malformation, he took no steps to ascertain its incurability.

The cohabitation of the parties ceases on wholly different grounds.

The lapse of time is not sufficiently accounted for.

The correspondence shows that sexual intercourse had taken place.

From the passages above cited, it appears that it was clearly the opinion of that eminent Judge that delay in the commencement of a suit of this description required to be accounted for, and might, with other circumstances, constitute a bar. In those cases the Court abstained from giving any opinion as to the mere lapse of time, but held it to be an important ingredient.

The inquiry, therefore, in the present case will be, whether the lapse of time is accompanied with other facts, which prove—to use Lord *Stowell's* expression—the insincerity of the suit; or, in other words, that whatever may be the defect of the wife, it was not a grievance to the husband, or the real cause why the suit was brought.

As regards the question of time and knowledge of the defect now complained of, it is pleaded by Mr. B. in the libel, and therefore, of course, admitted as against him, that very soon after the marriage he became aware that his wife was incapable of sexual intercourse, but he denies that he knew that the defect, whatever it might be, was incapable of cure. Now, during the cohabitation in India, which lasted from 1835 till 1840, there might have been more difficulty in obtaining adequate medical advice on such a matter; so far, however, as we have evidence, there does not appear any proof that Mr. B. was cognizant of that of which he now complains, and certainly made no attempt to ascertain the real state of the case. For this inertness there may be some cause; but when the parties were in England, and the cohabitation recommenced, in 1844, there no longer existed any reason why medical assistance was not resorted to, and the fact both of the impediment to consummation and the incapability of cure distinctly ascertained; but here again there is not the least evidence of any proceeding on the part of Mr. B. On the contrary, the cohabitation ceases, and a separation is agreed upon, for reasons wholly different. Mr. B. does not pretend that this separation was on account of the corporeal defect of his wife, nor could it be because he discovered it to be incurable, for that he says he did not discover till 1852.

In short, that so far as the lapse of time is an important consideration to these cases, Mr. B. has by no means satisfactorily accounted for the long delay in bringing this suit.

There are, however, other matters to which we must direct our attention: we refer to the correspondence, from which it clearly appears that a sexual intercourse of some kind had taken place between the parties, from which at one time Mr. B. even entertained the hope that his wife might become a mother; that throughout the whole of this long correspondence there is not the slightest allusion to any corporeal defect on the part of Mrs. B.; and, consequently, not the least complaint of

any deprivation or annoyance experienced by Mr. B. ; on the contrary, that correspondence shows that the parties lived and cohabited together for many years with affection expressed on the part of the husband, though occasionally with complaints of the temper and conduct of Mrs. B. And, finally, after the lapse of ten years from the period of the marriage, a separation takes place, on the ground of disagreement, without the slightest reference to the subject matter of this suit.

After the separation, Mr. B. goes back to India ; and in 1852 again returns to this country, and then brings the present suit, alleging that from the period of his marriage he knew that Mrs. B. was incapable, from personal defect, of sexual intercourse, but that he had only recently discovered that such defect was incurable.

Before expressing our opinion on this state of facts, we deem it right to advert very briefly to the medical evidence. We shall state merely the general effect of it, and it is this ; that there does exist a malformation which is incurable, and that it is impossible that this lady should become a mother, but that sexual intercourse, limited in some particulars, is not only practicable, but has actually taken place ; and two of the medical witnesses depose that the lady is not a virgin.

What would have been the effect of this state of things had the husband prosecuted his suit at an earlier period, or the wife had sued for a restitution of conjugal rights, we do not feel ourselves called upon to say (*a*) ; but taking into consideration the whole circumstances of the case, and founding our judgment on the whole, and not on part only, we are of opinion that Mr. B. is not entitled to a decree pronouncing this marriage to have been null and void, *ab initio*.

Proctors, for the husband, *Rothery* ; for the wife, *Bathurst*.

(*a*) This appears to leave the decision in *D*—against *A*—, 1 Rob. 279. untouched.

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The medical evidence.

Under the whole circumstances of the case, the husband is not entitled to a decree.

THE "KINGALOCK."

THIS was a suit for salvage brought by the owners and crew of the steam-tug, "Friend of all Nations," against the "Kingalock," a brig of 143 tons burthen.

this fact, agreed with the master of a steam tug for ordinary towage to London for 40*l*. During the service the master of the tug discovered the fact of such previous damage, repudiated the agreement, and brought a suit for salvage. *Held*, 1st. That additional salvage cannot be engrafted on an agreement for extraordinary though it may upon one for ordinary towage. 2nd. That the mere concealment of a fact which might operate on the service and therefore on the agreement, vitiates it. 3rd. That in this case the facts concealed might operate on the service by rendering it longer and more arduous, and that the agreement was invalid. 150*l*. awarded.

THE HIGH COURT OF ADMIRALTY.

Feb. 20.

The master of a brig, which had suffered considerable damage, without mentioning

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On the 26th of August, 1853, the brig was near the mouth of the Thames, bound from Newfoundland to London, with a cargo of oil and seal skins. The steam-tug, observing an ensign flying at her gaff, came to her, and entered into an agreement to tow her to London for 40*l*. After a short time the hawser broke, and the master of the tug then discovered, for the first time, that the brig had previously encountered tempestuous weather, and suffered considerable damage. He immediately, according to his account, declared the agreement at an end, continued to tow the vessel as though no agreement had been made, and, after great exertion and difficulty, brought her safely to the London Docks, on the evening of the 27th.

The owners contended that the original agreement for 40*l*. was binding and valid, though, to avoid litigation, they tendered 80*l*.

Dr. *Addams* and Dr. *Twiss* appeared for the salvors; Dr. *Haggard* and Dr. *Deane* for the owners.

Judgment.

DR. LUSHINGTON. I have no intention of departing from the principle laid down in the case of the "*Kilby*" (a); on the contrary, I am of opinion that the principle there laid down is well founded, and consistent with justice. The real question will be whether what I said in the case of the "*Kilby*" is applicable to the circumstances of the case now under consideration. The principle I there laid down is in these words: "Where there is an agreement to tow a disabled vessel from one port to another, it not being an ordinary towage service, I will not engraft upon it additional salvage for any little assistance rendered." I am exceedingly glad, though I confess I am somewhat surprised, that I should have expressed myself with so much caution on that occasion, because, when delivering a judgment, without its being previously written, it does not always happen that it is expressed in terms so guarded as these. I have made a distinction which I am about to explain, and I adhere to it. Now, let us consider these matters a little. It appears to me that there are two species of agreement which may be entered into by a vessel, whose usual occupation it is to tow vessels from one place to another. One is, where she meets with a vessel disabled, and where she undertakes, for any sum agreed upon between the parties, to perform the service of bringing the vessel from one port to another, or a place of safety. That may be called an extraordinary towage, because it is not in the ordinary occupation of the vessel, and not to be considered ordinary towage, which is of a different description.

Additional salvage must not be engrafted on an agreement for extraordinary towage.

Distinction between ordinary and extraordinary towage service.

Ordinary towage is that which takes place for the purpose of expediting a vessel on her voyage, either homeward or outward. Where a master of a towing-vessel, with his eyes open, sees another ship in any way disabled, and makes a bargain, cognizant of all the facts necessary to be known, he must be bound by that bargain; and any accident that may happen afterwards, any difficulty that may arise, any delay that may be interposed in the performance of that service, he, of course, must put up with, because he takes the chances, and makes a bargain to cover all such risks as these. I, therefore, repeat, that wherever a bargain is made in good faith for the towing of a vessel, I will not engraft upon it, whatever may be the circumstances that subsequently occur, any additional reward beyond that compensation which is stipulated to be paid by the mutual agreement between the parties.

But, with respect to ordinary towage service the case is different. There all that is stipulated for on behalf of the vessel towing is, that she shall receive the ordinary reward which is paid in compensation for that towage service, and the reward is not apportioned to the performance of a salvage service that may become necessary afterwards; therefore, I think, there is a clear distinction between the two cases. Where a service has been commenced as an ordinary towage service—the vessel being in no distress—for the mere purpose of expediting the voyage, if it happens that a salvage service unexpectedly becomes engrafted upon it, the towing-vessel may not be bound to take the ordinary reward for a towing service.

So much for the distinction between the two species of towing service.

Let us next consider whether there is an agreement for matters of this kind.

An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties; and if any fact which, if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud.

What I have to do on the present occasion is, a tender having been made of 80*l.*, which more than covers the agreement itself,

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An agreement made for ordinary towage may be terminated by subsequent circumstances which elevate the service into salvage.

An agreement may be vitiated by the concealment of any facts that might affect the service, and therefore might have operated upon such agreement at first.

Application of these principles to the circum-

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stances of the
present case.

to see whether there ever was a subsisting agreement; and, if so, to see whether it has been invalidated by any circumstances that have occurred subsequently to the agreement.

It appears that this was a valuable vessel, coming from Newfoundland, of the burthen of 143 tons. At the entrance of the river Thames she met, on the 26th of August, with extreme bad weather; she was compelled to slip from one anchor and cable, the foresail was split, and a new one was about to be bent when the steamer came up. It appears, on all hands, that these two circumstances were not disclosed to the master of the steamer, and the question therefore is, whether the omission to disclose these two facts would or would not have an operation on the agreement which was afterwards made between the parties. The agreement was for a sum of 40*l.*, and no doubt it was up to the port of London, as sworn on the part of the salvors. I apprehend that the agreement may be said to be somewhat of a mixed nature at that time; it is hardly to be considered an ordinary towage, not on account of the state and condition of the ship, but on account of the state and condition of the weather, which happened to be exceedingly tempestuous. I think whether the omission to state these facts would vitiate this agreement or not, will depend upon whether they could, with any reasonable probability, affect the service about to be performed. I am of opinion that they might have an effect on that service, because I apprehend that coming up the river Thames, particularly during weather so tempestuous as this is represented to have been, the services might have been delayed and rendered much more arduous, much more difficult in consequence of the want of ground tackle, which might be of the last importance to the saving of the vessel, and which might, to a certain extent, have governed the manœuvres of the steamer. I therefore come to the conclusion that, as it might affect the performance of the service, the agreement was null and void, *ab initio*. Having come to that conclusion, it is not necessary to follow the remaining facts, and I have only to ascertain what ought to be the reward, in the nature of salvage; because I agree with the argument addressed to me by Dr. Jenner, in entire accordance with what I said in the case of the "*Kilby*," and which I now repeat, that if there be an agreement for extraordinary towage, with a full knowledge of the state of the vessel, in that case no addition to the reward ought to be made, whatever might be the circumstances. It seems, in the present case, that the hawser broke, a second anchor and cable were slipped from, and it clearly appears to me that the vessel, at this time, was in very considerable danger of going on what is

called the Shingle Sand. The windlass, at that time, had also become disabled, and altogether it appears to me that the vessel was in a very dangerous position when she was taken in tow.

It is clear, from the evidence, that the steamer did sustain considerable damage and straining in the performance of the service, but upon this I place very little reliance, because, whether it is a case of ordinary towage, or extraordinary towage, the Court must be on its guard in considering any accident which may happen to a steamer as a good ground for augmenting the rate of towage. I am of opinion that the vessel was rescued from considerable danger by this steamer. The principle I have always endeavoured to follow is this, that when steamers render salvage service, they are entitled to a greater reward than any other set of salvors who render the same service; and for this plain and obvious reason: in consequence of the power they possess, they can perform such services with infinitely greater celerity than other vessels, with infinitely greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could by possibility prevail.

I think I may exemplify that upon the present occasion. When the vessel was lying off Sheerness, it is quite clear that no power short of that of a steamer could have prevented this vessel, in human probability, from being lost. In the present case I must overrule the tender, and give the sum of 160*l*. When I see the value of the property saved is 6000*l*., whether it is the owners or the underwriters who have this sum to pay, I think they ought to be well satisfied.

Proctors for the salvors, *Deacon*; for the owners, *Middleton*.

THE "ROSEHAUGH."

THIS vessel was proceeding, with a cargo of wheat, from Leith to Stockton, when she was driven by stress of weather, off Flamborough Head, forty or fifty miles south of her port of destination. Two cobs went out to her assistance, and conducted her into Bridlington Harbour, for which service they claimed salvage remuneration. This the owners refused, on the ground that the service was pilotage only.

Dr. Jenner appeared for the salvors; Dr. R. Phillimore for the owners.

DR. LUSHINGTON. I will, in the first place, advert to the

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The Court must be on its guard as to allowing an accident to the towing-vessel to be a good ground for augmenting the rate of towage.

The Court always awards a higher rate of salvage to steamers than to other vessels.

THE HIGH
COURT OF
ADMIRALTY
March 23.

Pilotage service in a place where there are no licensed pilots. A service which would be pilotage in the case of a duly licensed pilot becomes salvage, as regards the reward, when voluntarily performed by others.

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point alluded to by the learned counsel who has just sat down.

It appears that this is a harbour to which no regular pilots are appointed by law; and difficulties have arisen, not only in this, but in other cases, as to the state and condition of persons represented as performing the duties of pilots there, and occasionally the duties of salvors, as the case may be. Pilots unquestionably do not stand on the same footing as these persons; and for this reason—in the first place, they are under no obligation to go out to vessels at all; the pilotage remuneration is fixed on the ground of its being a monopoly, and the persons so engaged being employed in preference to any one else, and consequently an obligation is imposed upon them of always going out—unless it be at the risk of their lives—and performing their duty, whatever may be the other circumstances.

It is the supposition of the law—I presume a well-founded supposition—that the rate of pilotage service, taking one case with another, is an ample remuneration for the services performed; but there is a striking difference between a person possessed of such monopoly, and entitled to charge a given sum, and a person voluntarily performing a duty, whether a pilotage or a salvage service, because the latter has a right to exercise his own judgment as to whether he will go out on the service or not, and may then demand a fair remuneration for whatever he does. It might happen that mere pilotage pay would be no reward at all to a person who goes out under these circumstances. I will take a case resting on the strongest grounds. Suppose there was no such danger as to prevent a pilot going out for the ordinary rate of pilotage, it would not follow that individuals who voluntarily perform that duty would be entitled to no more pay, because the grounds are totally different. It may be a misfortune, but it is one that cannot be helped; and what the Court must do is to give the person who performs the service the sum which, according to its judgment, is actually deserved.

The learned Judge, after stating the circumstances of the case, said,—It is a service that must be compensated; nothing has been offered, and it has been treated as if these people were regular pilots, and as if, by offering them pilotage, you could get rid of the case. That, however, is not so; and I shall give them 15*l*. I wish that such cases as these should be settled on the spot, and not brought here.

The proctor for the salvors said,—Every endeavour was made to settle it on the spot, but the owners refused.

THE COURT. Then the owners must pay for that refusal in the costs.

Proctors, for the salvors, *Jenner*; for the owners, *F. Robarts*.

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THE
"ROSEHAUGH."

THE "WANSFELL."

THE "Wansfell" and the "Edward Johnston," two vessels of nearly 1000 tons burthen, came into collision near the Skerries Lights, about two A. M. of the 1st December, 1853.

Cross-actions were entered. The respective cases are stated in the judgment.

Dr. *Bayford* and Dr. *Twiss* appeared for the "Edward Johnston," Dr. *Addams* and Dr. *Curteis* for the "Wansfell."

DR. LUSHINGTON, addressing the Trinity Masters. (a) Gentlemen,—This collision took place on the morning of the 1st of December, in the Irish Channel. The weather, as it appears to me, though rather hazy and rainy, was not such that the collision could be the result of inevitable accident. There is some discrepancy in the evidence produced by these two vessels, especially respecting the quarter from which the wind was blowing. It is alleged by the "Edward Johnston" that the wind was south; by the "Wansfell," that it was south-east—a difference of four points. It is said, on the one hand, that the "Edward Johnston" was close hauled; upon the other, that the "Wansfell" was close hauled. It is impossible for me, and I should think somewhat difficult for you, to state from which quarter the wind blew. If, however, the wind was between the two statements, then it might be that neither vessel was close hauled, looking at the course which they pursued.

The representation of the "Edward Johnston" is, that she was close hauled on the port tack when she saw the "Wansfell;" that as soon as she saw the light of that vessel, she luffed; and it is alleged that she luffed again upon her nearer approach. We will admit, for the purpose of the questions which I am about to put to you, the statement made on behalf of the "Edward Johnston," and will consider the "Wansfell" to have been on the starboard tack, sailing free.

Now the questions on which I shall have to request your opinion are of considerable importance to the result of this case; the first is, whether the "Edward Johnston" was to blame for having luffed, and for not having ported; the second, whether,

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ADMIRALTY.

March 24.

Two vessels, the one A. close hauled on the port tack, the other B. on the starboard tack, sailing free, meet each other under circumstances of probable collision; A. luffed twice.—Held, that she was to blame for not having ported, that the collision was principally occasioned by her non-obedience to the rule, and that by the statute she would not recover. B. also luffed up three times; held, to blame for not having ported in time. Neither vessel can recover.

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supposing her to blame, the collision was *occasioned* by the not porting her helm.

It is your duty always to bear in mind the Act of Parliament which was passed for the government of cases of this description. Whether that Act was right or wrong, it is your duty and mine to carry it into execution to the best of our judgment. The words are these: — "Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he" (that must be the master of the vessel) "shall put the helm of his vessel to port, so as to pass on the port side of the other vessel." (a)

Now we have nothing in the nature of a channel to impede the operation of this rule. I, therefore, leave that entirely out of consideration, and simply put the question to you, whether the two vessels were not approaching each other in such a course that if they continued there was clearly a risk of collision, and whether, under these circumstances, it was not the bounden duty of the "Edward Johnston" to port instead of starboarding her helm? If you should be of that opinion, the next question will be one of considerable importance, namely, whether the collision was *occasioned* by the non-observance of this rule?

It appears to me, looking at the facts of this case, that the collision may have been occasioned either by the non-observance of this rule, or by the misconduct or neglect of those on board the "Wansfell."

I now come to the case of the "Wansfell." She represents herself to have been on the starboard tack, close hauled, and that the wind was north-east, inclining to west. She says her own course was south-east by east, so that you have seven points between the wind and her course. Looking at the representation of the "Wansfell," I cannot satisfy myself that she was so close hauled on the starboard tack as she represents herself to have been. The next question is, whether, under the circumstances I have stated, it was not her duty to have ported, and to have ported in time. I think the evidence in this case clearly shows that if each vessel had discharged her respective duties, no collision would have taken place; therefore the question will not only be whether she was bound to port, but to port in time. It is not my intention to occupy your time in going through it, but there is important evidence in the case, and, according to her statement, she luffed up no less than three times.

(a) 14 & 15 Vict. c. 79. s. 27.

DR. LUSHINGTON, having retired with the Trinity Masters for consultation, said, on their return,—

The gentlemen by whom I am assisted are of opinion that the “Edward Johnston” was clearly to blame, and this is also my opinion. She is not only to blame, but the collision was *occasioned* principally by her conduct. It is clear, therefore, whatever may be the conduct of the “Wansfell,” the “Edward Johnston” cannot recover; because, where the collision has occurred by the non-obedience to the rule of porting the helm, it is directed by the Act of Parliament that the vessel should not recover in that action.

There is a cross-action brought by the “Wansfell” against the “Edward Johnston,” and the gentlemen are of opinion that the “Wansfell” is to blame also; for she was, in fact, sailing free, and she did not do her duty, which was to port her helm in time.

Therefore the result is that, neither succeeding in the action, each must pay their own costs. (a)

Proctors, for the “Edward Johnston,” *Tebbs*; for the “Wansfell,” *F. Clarkson*.

(a) Upon this decision a question is likely to arise whether the “Wansfell,” though to blame for not porting in time, is barred of recovery by statute, or whether the general Admiralty law in cases where both vessels are to blame, is to be applied to her cross-

action. In the latter case it would seem that the “Edward Johnston” would have to pay a moiety of the “Wansfell’s” damage, though she could recover nothing on account of her own damage.

THE “MINERVA.”

THIS was a cause of salvage brought by the “Pilot,” a steam-tug, manned with seven hands, against the “Minerva,” a schooner, of the burthen of 98 tons, laden with a general cargo.

The whole circumstances are stated in the judgment.

Dr. *Haggard* and Dr. *R. Phillimore* appeared for the salvors; Dr. *Addams* and Dr. *Twiss* for the owners.

DR. LUSHINGTON. This is a claim for salvage preferred by eleven persons, of whom nine, at least, were pilots, who went out from the harbour of Shields to perform the service on the 6th of January, 1854. They succeeded in saving property which, including the ship and cargo, amounts to the value of 2320*l*.

I will first address my attention to the danger to which the ship and cargo were exposed, if any, at the time they went out to render assistance. It appears that she was a vessel of 98

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“WANSFELL.”
Judgment.

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March 27.

Where the value of the property saved was 2320*l*, the Court, under the circumstances, and considering the case one of great merit, awarded the salvors the sum of 600*l*.

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tons, and sailed from Newcastle on the 2nd of January, laden with a general cargo, bound to London. The statement on behalf of the owners is to the following effect:—"On the night of January 5. she was brought to anchor about three quarters of a mile from the shore off Limekiln, a point about a mile and a half from Whitburn, in the county of Durham, and that on the following morning a signal for assistance was hoisted on board the said schooner, as it continued to blow hard, although as the day advanced the wind considerably abated."

As the master and the whole of the crew were lost, we are unable to obtain, from the most general source of information, what was the real state and condition of the vessel at the time, —what were the dangers which were apprehended, what were the perils which induced them to abandon the vessel, though at the risk of their lives. However, it is clear, from the signal of assistance being hoisted, that they apprehended some assistance was necessary, and that the vessel was in some degree of peril.

Now, without adverting to the affidavits produced on behalf of the salvors, I shall first direct my attention to the evidence of a person who ought to have been able to contribute to the knowledge of the Court upon this subject, — I mean the affidavit of Mr. Hutchinson, who represents himself as a fisherman, a deputy at Whitburn to Lloyd's agent, and receiver of droits for the port of Sunderland. He states: "About half-past three o'clock in the morning this deponent saw the 'Minerva,' distant fully one half, if not three quarters of a mile from the shore; that she was riding at anchor as easily as any vessel could well ride." Now, when I read this affidavit, of course I endeavoured to tax my ingenuity as to why it was that a vessel in this quiet state should have been abandoned, which abandonment led to the loss of the master and crew.

With extraordinary simplicity he proceeds to state: "That the crew of the said vessel were drowned about one o'clock in the afternoon, and almost immediately afterwards the sea and weather became quite calm; that he verily believes that there was no risk in a boat going from a steamer to the 'Minerva' at the time the 'Pilot' steam-tug came alongside of her."— It is somewhat singular that no boat had ventured out, notwithstanding the signal of distress, though the life-boat was in the neighbourhood where the signal was seen. — "That the fishermen belonging to Whitburn would have gone off in their life-boat to the 'Minerva' if they had thought she was in danger."— At least they might have supposed there was some degree of

danger when they saw the flag of distress. When I see the contradiction between this affidavit and the other evidence in the case, I am somewhat surprised at the conclusion he draws: — “But seeing there was no danger, they thought it useless going to her with the lifeboat.”

How comes it about, if all this be true, that the unfortunate persons on board this vessel risked their lives in the hope of saving them? What motive could they have had for leaving the vessel, except that of the imminent peril they were in? They must have thought that the only chance of saving their lives was by taking to their boat. I must confess that this affidavit, coming from a gentleman aged eighty-three, did surprise me. The search that must have been made for evidence does infinite credit to those who act on the part of the owners. However, so it was; the crew thought it for their advantage to run this risk; and, unfortunately, they were all drowned. I can come to no other legitimate conclusion than that they thought the ship was in imminent danger, and that their lives were exposed to peril.

A question has been raised as to whether this vessel was a derelict or not, in the legal sense of the term. It is impossible for us to ascertain whether the crew of the vessel had a *spes recuperandi* or not; but, be that as it may, the vessel was quitted; and, whatever *spes recuperandi* they might have had, it unfortunately was terminated by their deaths. I cannot doubt that in every sense, legal or otherwise, this was to be considered a derelict.

Having disposed of that part of the case, I now come to the question, was there any danger in crossing the bar? I have affidavits from persons entirely disinterested, eye witnesses of the transaction, perfectly cognizant of the state of the coast, and seeing everything that occurred, speaking in the most positive terms to the great risk incurred by the pilots in performing the enterprise they undertook. I have, also, the instance of another vessel which attempted to make the schooner, but was deterred in consequence of the danger, and went back.

All these facts are proved — if anything can be proved in a salvage case — which some, who have great experience, may doubt. They are contradicted by nothing worth consideration, with the single exception of the “Tam o’ Shanter.” I will suppose that the case of the “Tam o’ Shanter” was identical with this in the enterprise, and then I think the answer is, that those people were not paid as they ought to have been; and it is my duty to pay no regard to it at all. If they did encounter this risk, and perform a service at all like this, it is a matter of

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astonishment to me that they should be contented with the remuneration they received. Supposing the fact to be so, it would make no difference whatever in my mind.

But it is said there could not have been the same danger, or the "Tam o' Shanter" would not have gone out. In the first place there was a difference in the tide. The one went out when the tide was ebb; the other, when it was approaching flood. Any one conversant with what is seen on the coast must be well aware that there is no danger at one time, and great danger at another. The places in which the two vessels were, at the time the services were rendered, are totally different.

Looking at the whole of the facts, and being of opinion that there are great ingredients of merit to constitute a claim for a high rate of salvage, but, at the same time, remembering that the judgment of the Court must be guided by justice, I lay out of consideration old rules; I never think of a moiety or any other such sum; I endeavour to give a reward proportionate to the service. I think this was a great enterprise, and I will add to this, though it has been very ingeniously argued that the salvors might and must have known that the crew had left the vessel, yet there is no evidence of that fact. These persons commenced the enterprise long before the crew quitted the vessel; but had they been told that the crew had quitted for the shore, it was impossible for them to know that no part of the crew had been left on board. Had this unfortunate crew exhibited a little more patience, the going out of the steamer might have been the means of saving their lives.

Looking at the whole case I am of opinion that 600*l.* is a proper reward to give the salvors.

Proctor for the salvors, *Stokes*; for the owners, *F. Clarkson*.

ARCHES
 COURT OF
 CANTERBURY.

Feb. 14.

In a suit for restitution of conjugal rights carried on *in pœnam*, the husband was imprisoned under a writ *de contumace capiendo*, for not obeying the order of the Court to take his wife home, &c.

LAKIN *against* LAKIN.

THIS was a cause of restitution of conjugal rights, promoted by virtue of letters of request from the Consistory Court of Lichfield, by Caroline Lakin, against her husband Abraham Lakin.

The suit commenced in December, 1849; and, no appearance having been given for Mr. Lakin, the proceedings against him were carried on *in pœnam*. On the third seas. Easter Term, 1850, the Judge, Sir *Herbert Jenner Fust*, by interlocutory decree, pronounced the libel proved, and assigned Mr. Lakin to take his wife home and treat her with conjugal affection. Of this decree, which was personally served upon him, he took no

notice. On the second sess. of Trinity Term, the Judge, at the petition of Mrs. Lakin's proctor, pronounced Mr. Lakin contumacious and in contempt, and directed his contempt to be signified according to the statute.

A writ *de contumace capiendo* was thereupon extracted from the Court of Chancery against Mr. Lakin, under which he was, on the 12th of June, 1850, arrested and imprisoned in the county gaol of Salop, where he has ever since remained.

It appeared, from affidavits now brought in, that in the month of September 1849, Mrs. Lakin had eloped from her husband's house at Whitchurch, in the county of Salop, with a man named John Dale, and that she had ever since been living in adultery with him at Liverpool; that her husband, who was a journeyman cabinet-maker, on wages of 25s. a-week, and had four children to support, was prevented by want of means from taking any proceedings against her; that Mr. Lakin on, being served with the decree returned in this cause, thought his wife could not seriously intend to prosecute such proceedings, and, from fear of incurring expenses, abstained from seeking legal advice thereon; that, having been improperly advised by his friends, he neglected to attend to the instruments served upon him, and was on that account ultimately imprisoned; that he has now remained in prison three years and a half; that he has recently obtained information of his wife's having been delivered of a child, which child was registered at the office of the registrar of births and deaths as the "child of John Dale and Caroline Dale, late Lakin," and that Mrs. Lakin had acknowledged the said child to be hers.

Mr. Lakin's affidavit also stated that he was willing and desirous to obey the orders and commands of this Court in all things lawful for the future. It further appeared that Mrs. Lakin had been informed that an application would be made to the Court for Mr. Lakin's release, and that she replied thereto that she should have or make no objection thereto.

Notice had also been given to Mrs. Lakin's proctor.

Sir J. D. Harding Q. A. now moved the Court to absolve Mr. Lakin from his contempt and contumacy, and to direct an order to be made upon the sheriff of the County of Salop for discharging him from custody, and said the Court was empowered to do so either under 53 Geo. 3. c. 127., or under 3 & 4 Vict. c. 93. The latter required the consent of the opposing party in the suit, but did not require the submission of the party imprisoned for contempt; the former required the submission of the party in contempt, but did not require the consent of the other party to the suit. In the present case, the party in con-

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After three years' imprisonment, he applied for his discharge. The Court, under the peculiar circumstances of the case, discharged him on his professing obedience for the future, and without enforcing the order for the contempt of which he was imprisoned.

Argument.

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tempt had originally a good ground of defence to the suit, but being badly advised, had neglected to obey the orders of the Court. He now submitted himself, and professed his willingness to obey the lawful commands of the Court for the future. The Court could, therefore, order his discharge under the statute of 53 Geo. 3. c. 127. The statute of 3 & 4 Vict. c. 93. was only auxiliary to that statute, and did not repeal it. But if the Court had any doubt upon that point, it was competent to the Court to discharge the prisoner under the later statute, for the affidavits showed sufficient consent on the part of Mrs. Lakin, the opposing party in the suit. She was informed of this application, and expressed her intention not to oppose it. Notice has also been given to her proctor, and his non-appearance is a constructive consent. As Mrs. Lakin might, perhaps, give further trouble by denying her consent at some future time, it would be preferred to have the discharge under 53 Geo. 3. c. 127., if the Court thought it could, under the peculiar circumstances of the case, order his discharge upon his profession of obedience for the future, without requiring him to obey the particular order for the disobedience to which he was imprisoned.

Judgment.

SIR JOHN DODSON. This is certainly a very hard case. This person has suffered a long imprisonment through the ill advice of friends, for there seems but little doubt that he would have had a good answer to the suit if he had thought proper to appear. I do not know that I am bound to enforce the order upon him to take his wife home and treat her with conjugal affection, for that order would certainly never have been made if the facts now brought to the knowledge of the Court had been made known at the proper time. He now submits himself, and professes his willingness to obey all the lawful commands of the Court. I think that is sufficient, and I will sign the writ of deliverance annexed to statute 53 Geo. 3. c. 127.

Proctor for the applicant, *Pritchard*.

PREROGATIVE
COURT OF
CANTERBURY.

Nov. 23, 1853.

March 8, 1854.

CUTTO *against* GILBERT.

A. C. made a will in 1825, and in 1852 duly executed another testamentary paper, the contents of which were unknown, beyond the fact

THIS was a business of granting probate of the last will and testament, bearing date August 11 1825, of Abraham Cutto, late of Granda Place, Old Kent Road, promoted by Ann Cutto, widow, the relict of the deceased, and sole executrix named in the said will, against Elizabeth Gilbert, widow, the natural and lawful sister, and only next of kin of the deceased.

The proctor for Mrs. Gilbert admitted the said instrument

to be a duly executed will of the deceased, but alleged that the same had been revoked, and that the deceased was dead intestate, and brought in an allegation to the following effect: —

First and second articles pleaded, the history of the deceased, and his death on the 16th of July 1853.

Third. *That*, on the 11th of August 1825, the deceased (whose property at such time was of very small amount) duly executed the will, &c., and thereby bequeathed all the estate and effects which he then possessed to the said Ann Cutto, and appointed her sole executrix.

Fourth. *That*, upon an occasion happening four years or thereabouts before the death of the deceased, the said Ann Cutto inquired of him whether, from the lapse of time since the date of the said will, any confirmation or re-execution thereof was necessary, whereupon the deceased replied that the said will was perfectly valid and did not require any confirmation, or in words to that effect.

Fifth. *That* the said Ann Cutto saved, out of the allowances paid to her by the deceased for household purposes, a sum of money amounting in the whole to 5000*l.* or thereabouts, and invested the same for her own use and benefit in the purchase of government stock; *that*, some time shortly before the year 1852, the deceased became aware of such investment, and although he expressed himself displeased thereat, he did not deprive her thereof, nor in any way interfere with the same.

Sixth. *That* the deceased entertained and expressed great regard for his said sister, Elizabeth Gilbert, and her family, corresponded with her, and occasionally visited her at Spalding, in the county of Lincoln; *that* the deceased and his said sister were on terms of intimacy with Ashley Maples, who also resided at Spalding, and was trustee of deceased's father's will; *that*, in the summer of 1852, during two visits to his said sister, the deceased, in reference to the contents of the will of his said sister, which he had recently perused, and the state of her family, held several confidential communications with the said Ashley Maples, and then intimated to him his intention of benefitting his said sister and her daughters by his own will.

Seventh. *That* the deceased returned from the second of his visits to his sister in August 1852, and very shortly thereafter, being of sound mind, and having an intention to make his last will in writing, and thereby to revoke his said will bearing date the 11th August 1825, and to make (amongst others) a provision in favour of his said sister and her daughters, did, with his own hand, draw up and reduce the same into writing, and did, on the day of the date thereof, produce at the office of John

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against
Gilbert.of its beginning
and ending
with the words
"last will."At his death
the later instu-
ment was not
forthcoming,
but there was
no evidence of
its destruction.
Held, that the
former will,
though exist-
ing uncan-
celled, was re-
voked, and
that the de-
ceased died
intestate.*Allegation.*

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White, a solicitor, to two of his clerks, a paper writing, being the very last will and testament so drawn up by the said deceased; and did declare the same to be his last will and testament, and did then and there set and subscribe his name at the foot or end thereof, and affix his seal thereto (though informed that it was unnecessary), in the presence of the said two clerks, who thereupon attested and subscribed the same, as witnesses in the presence of the deceased, and of each other; *that* the said will was not supplemental or codicillary, but was a substantive will, and *that* from and after the execution thereof his said former will was revoked; *that* the deceased was of perfectly sound mind, &c.

Eighth. *That* the deceased, on leaving the office of the said John White, with the said will in his possession, immediately after the execution thereof, met the said John White, and declared to him that he had just executed his will in the presence of his clerks, and that he had wished him to attest his said will for him.

Ninth. Deceased's illness and death.

Tenth. *That* the said will, which cannot now be found, was in the handwriting of the deceased, and commenced with the words "This is the last will and testament of;" *that* the same was described in the attestation clause thereof as "the last will and testament" of the deceased.

The admission of this allegation was opposed.

Nov. 23. 1853.

Sir J. D. Harding Q. A. against its admission.

In order to revoke a first will by a later there must be either a distinct clause of revocation, or the later must be inconsistent with and substantially different from the former. The law has not said that under all circumstances a later will must revoke a prior instrument: *Goodright v. Glazier* (a), *Harwood v. Goodright*. (b) The law, in that respect, has not been altered by the statute. It is clear on the face of this allegation, that the contents of the later will are not known. It is not even alleged that the later was substantially different from the former; nor that the whole property was thereby disposed of. The mere declaration, that an instrument is a last will and testament is not sufficient to make it revocatory of all former instruments.

Dr. Deane, on the same side, cited 11 *Jarman's Conveyancing* (c), *Re Lewis* (d), 1 *Wms. Executors*, 134.

Dr. Haggard, *contrd.* These Courts are governed by the Civil

(a) 4 Burr. 2512.

(c) P. 119.; 429. n. b.

(b) Cowp. 92.; S. C. 3 Wils. 497.;

(d) 14 Jur. 514.

2 Black. 937.; 7 Bro. P. C. 344.;

1 Saund. 279. h.

Law, and have always adopted the principle, *posteriore testamento superius rumpitur*. (a) There is no necessity to show an inconsistency with the former will. The rule of Common Law may be different—for there may be there two substantive wills, and therefore, in order to establish revocation, it may be necessary to prove repugnancy. That doctrine has never been imported into the Court of Probate; yet the whole argument on the other side proceeded on its assumption. The doctrine of the Court of Probate was recognised by Lord *Mansfield* in the case cited on the other side: *Harwood v. Goodright*. He says: "Though as to personal estate the law of England has adopted the rules of the Roman testament; yet a devise of lands in England is considered in a different light from a Roman will. For a will in the Civil Law was an institution of the heir; but a devise in England is an appointment of particular lands to a particular devisee," &c. (b)

Helyar's Case (c) shows the law of these Courts, and that case was noticed both by Lord *Mansfield* and Mr. Justice *Yates*, in *Goodright v. Glazier*. (d) The doctrine has been followed in later years in *Henfrey v. Henfrey* (e), which was affirmed by the Privy Council, and again in *Plenty v. West*. (f)

The circumstances pleaded are quite sufficient to show that the later instrument was a substantive will and, therefore, that the former was revoked.

Dr. *R. Phillimore* followed on the same side.

Sir *J. D. Harding* Q. A. and Dr. *Deane* replied upon the cases.

In *Helyar v. Helyar* the contents were known. The executrix was different. So in *Plenty v. West*. In fact, the Court is asked to decide this case, not so much upon any case in point, but upon an *obiter dictum* of the learned Judge. *Plenty v. West* was cited in the Common Pleas, where it was not considered authority. (g)

PER CURIAM. Was there any evidence in the case of *Helyar* of a different disposition?

Sir *J. D. Harding*. Yes; there was a difference both in the executrix and the residuary legatee.

SIR JOHN DODSON. There is certainly some difference between the case of *Helyar v. Helyar* (h) and the case I am now called upon to determine. But it is pleaded, and I must take it

(a) Inst. ii. 17.

(b) Cowp. 90.

(c) 3 Atk. 798; 1 Cas. temp. Lee, 472.

(d) 4 Burr. 2512.

(e) 2 Curt. 468; 4 Moo. P.C. 33.

(f) 1 Robert. 264.

(g) 6 M. G. & S. 216.

(h) 1 Lee, 472.

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to be true, at least for the present, that the later instrument in this suit commenced with the words "This is the last will and testament of," &c., and that the attestation clause also described the instrument as "the last will and testament" of the deceased.

In the case of *Helyar v. Helyar* there were, however, different executors, and a different disposition of the residue appointed under the two wills (*a*); therefore, the case was stronger than the present. All the information which I can collect from the allegation before me is, that the lost instrument was described in the commencement, and in the attestation clause, as "the last will and testament;" there is also a general averment that it was substantive, not codicillary.

The case of *Plenty v. West* (*b*), also cited at the bar, seems to me to come very much nearer to the point than the former case; still there is certainly a distinction which was pointed out by the learned counsel.

In that case both instruments were before the Court; in this the later is not forthcoming. In that case it was contended by one of the parties that the two instruments were not wholly inconsistent, and on that ground probate of both, as together containing the will, was prayed; but the learned Judge was of opinion that he could not grant that prayer for the reason he assigned, namely, that he knew of no case in which a former paper has been allowed to operate and form part of the probate, when there is a later instrument described as "the last will." It is true some comment was made by the Judges in the Common Pleas on the doctrine laid down by my learned predecessor, but I do not find that they denied it to be law, when applied to personalty. Since then it is the law of this Court (which, until overruled, I am bound to follow), and as we have the authority of the two cases cited, particularly *Plenty v. West*, I think I shall only do what is consistent with the laws of the Ecclesiastical Courts, in admitting the present allegation to proof.

The cases cited by the *Queen's Advocate* as to the law of real property are certainly very important, but they do not seem to me to bear on the question I have to decide.

The Queen's Advocate. I submit that if *Plenty v. West* is strictly law, there is a complete variance between Common Law and the law of these Courts.

THE COURT. It is the Civil Law on which this Court proceeds, and there the doctrine respecting the question before me is laid down in the strongest terms, without any exception whatever, *posteriore testamento prius ipso jure rumpitur*. There may

(a) 1 Lee, 472. 475.

(b) 1 Rob. 264.

be an irreconcilable difference between these Courts and the Courts of Common Law, but that will not justify me in deviating from what I apprehend to be the law here until I am so instructed by a higher authority.

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The allegation having been admitted, and witnesses examined, the case was argued by the same counsel on the evidence. In addition to the former cases cited, *Stoddart v. Grant (a)* was referred to.

SIR JOHN DODSON. Mr. Abraham Cutto, the deceased in this cause, died on the 16th of July last, possessed of personal property of the value of upwards of 5000*l.*, leaving a widow, Ann Cutto, and a sister, Elizabeth Gilbert, his only next of kin, the respective parties in the suit.

Judgment.
March 8.

It appears that the deceased made and duly executed a will, bearing date the 11th of August 1825, and therein appointed his said wife executrix and universal legatee. It is not denied that this will was duly executed, and was to all intents and purposes a valid instrument; but it is alleged that it has been revoked by a subsequent instrument, duly executed by the deceased for that purpose; that this latter instrument has been destroyed by the deceased, or at least is not now forthcoming; and that, therefore, the deceased is dead intestate.

The allegation given in on the part of Mrs. Gilbert was opposed, but after hearing the arguments of counsel, the Court admitted it, being of opinion that if the facts therein alleged were fully proved, the will of 1825 was revoked, inasmuch as by the law of these Courts the execution of a will relating to personal property amounts to a revocation of a former will, whether the contents of the later instrument are known or not, provided there be in substance or effect, revocatory words. Under the statute there can be no revival of the former from mere presumption of intention.

By the admission of that allegation the question of law was settled, so far as this Court is concerned. If that decision was erroneous, it is a satisfaction to the Court to know that its error may be rectified by an appeal to a superior tribunal.

The point of law being settled to the best of my judgment, the only question for the present consideration of the Court is whether there is sufficient proof that the later instrument was duly executed, and that it was a *bonâ fide* substantive will, and was not merely codicillary. Now, when an instrument has been destroyed, it frequently happens that its contents may be proved by a draft which has been preserved, by the

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memory of the witnesses, by the deposition of persons who were privy to its contents, or by some other means; and then the character of the instrument can be accurately ascertained without much difficulty; but in the present case there are no written instructions produced, no draft, no fair copy. The instrument was in the deceased's own handwriting, and the contents were known to no one. The Court is, therefore, under the necessity of forming its judgment from a review of the whole circumstances of the case.

The deceased was a solicitor, and for thirty-six years held an appointment as clerk in the Receiver-General's department of the General Post Office, which he resigned in the year 1851. About the same time he also retired from professional practice, and confined himself to the transaction of some business relating to some trust property in which he was concerned in the office of his friend, Mr. White, also a solicitor, in Barge Yard, in the city of London. In the summer of 1852, being on a visit to Mrs. Gilbert, his sister, at Spalding, in Lincolnshire, he, in a conversation with Mr. Maples, intimated his intention of benefiting his sister and her family by his will. The evidence of Mr. Maples upon this point is in these words: "The tenor of his conversations on those occasions was such as to impress me with the belief that he was going to make some provision by his own will in favour of the daughters of his said sister; it was of them more particularly he spoke; . . . my impression is that he made use of the word 'will,' in reference to himself and such his intentions in their favour, but I cannot speak to his exact expressions. He did not tell me in distinct terms what he was going to do, but he so expressed himself as to convey to me the impression that his intentions were as I have now expressed." Beyond that Mr. Maples is unable to carry his testimony.

But it appears, that after this visit to Lincolnshire, he drew up with his own hand an instrument which he executed in Barge Yard Chambers, London, at the office of Mr. White. It appears that this instrument, whatever may have been its nature or its purport, was duly executed according to the requirements of the statute.

I must resort to the evidence of the witnesses to see, if possible, what was the character of this instrument. The first witness is Thomas Watkins, a clerk of Mr. White's. He says, "I remember witnessing a paper for the said Mr. Cutto, at Mr. White's office. I cannot recollect the date accurately, but my impression is, that it was about a twelvemonth before his death. . . . He came into the clerk's office, where I and my

fellow witness, William Ward Floyd, were, and he said to us he wanted us to witness something; whether he said witness this, or witness my will, or what other expression he used, I do not clearly recollect. . . . I certainly was under the impression that it was his will; and though I do not actually recollect it as a fact, I think he must have spoken of it as such, or else I should not, I think, have made the remark I did in reference to the seal; I knew nothing whatever of the contents of the paper we so signed. I took so little notice of it that I do not know if it was in Mr. Cutto's handwriting or not; I do not know if it had an attestation clause to which we put our names; I only know that it was a paper with writing upon it. Probably knowing Mr. Cutto to be an attorney, I was induced to take less notice than I otherwise might. I have not the slightest recollection of the form or contents of the paper beyond its having the seal, &c."

So that from Mr. Watkins we get very little information indeed as to the nature of this instrument. The deceased did go to Mr. White's office about a year before his death, and ask this witness to attest an instrument or paper, but whether it was a will, or what it was, he does not know. He really knows nothing that throws any light upon the subject. From the circumstance that Mr. Cutto was an attorney, he took the less notice of it.

The next witness is John Ward Floyd, another clerk of Mr. White's, and he fortunately gives us some more precise information. He says, "I remember witnessing a paper for the said Mr. Cutto in Mr. White's office. I should think it must have been about eighteen months ago; I have, however, nothing to guide me as to the time. . . . Mr. Cutto came into the office, and said to me, 'John, I wish you to witness my will;' and seeing Mr. Watkins there, he asked him to step in also, and he and Mr. Watkins and I accordingly went into Mr. White's room; Mr. White was out at the time. Mr. Cutto then took a paper out of his pocket, and opened it on the desk, and proceeded to sign it; Mr. Watkins noticed that there was a seal on the paper, and he observed to Mr. Cutto that a seal was unnecessary to a will now. This was said on the supposition that the paper was a will, Mr. Cutto having so spoken of it in asking us to witness his will."

That this conversation passed, I think there can be no doubt, and I would here remark, that looking back to Mr. Cutto's will of 1825, I find that he there made use of a seal at its execution. In reply to Mr. Watkin's remark about the seal, Mr. Cutto replied, "Yes, I know, but it don't matter;" or words to that effect.

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On the tenth article this witness deposes, "My impression is, that it was a short will, being written three parts down a side of paper, but I did not know what its contents were. . . . I cannot, from positive recollection, say what were the commencing words of the said paper; but my impression is, that as the paper lay open before me, I saw that it commenced with the words 'This is the last will and testament of,' or some similar words, denoting the paper to be the last will and testament of Mr. Cutto. We knew the paper to be Mr. Cutto's will, and my impression is, and I have no doubt that I saw and read so much of it as showed it to be so, though on that point I am not able to speak from positive recollection." So that the impression upon this witness's mind is, that he saw the words "The last will and testament," and connecting that with the circumstance of Mr. Cutto asking him to witness his will, he seems to entertain very little doubt that he read so much of the paper which he attested as satisfied him that it was the last will and testament of the deceased; and this opinion seems to me to be confirmed by the testimony of Mr. White, to whom the deceased, on meeting him when leaving the office, mentioned that he had been making his will, and that it was a short will, "just like your father's."

Under all these circumstances, it appears to me that there is pretty clear proof that the paper executed by the deceased in the year 1852 was not a mere codicil to the will of 1825, but a *bonâ fide* substantive will, and as such would revoke that instrument.

I would guard myself against laying it down as an invariable principle, that the fact of a testator's calling an instrument his last will, is of itself sufficient to invest it with the character of a substantive will, so as to revoke all former instruments; undoubtedly instances have occurred in which persons have described an instrument as a "last will," and have merely given one legacy additional to a former instrument; but *primâ facie* an instrument so described must be taken as a will; and, under the circumstances of this case, this gentleman, having prepared an instrument, called on two persons to witness his will, and having made a declaration subsequently that he had made his will, I think I must consider this as a regular *bonâ fide* will, which must operate as a revocation of the former instrument.

The deceased must, therefore, be considered to have died intestate, for under the present statute (a) the former will cannot

(a) This case fully illustrates the remark of the Real Property Commissioners: "The only exception we think necessary to this rule (non-

be revived by the destruction of the later, whatever may have been the intention of the deceased.

With regard to costs, I am of opinion that through the act of the testator himself this inquiry was absolutely necessary, and that it is a proper case for the costs of both parties to be paid out of the estate.

Proctor for the widow, *Nicholson*; for the next of kin, *Currey*.

revival) is, where a will which has been wholly or partially revoked by a subsequent will or codicil, is left perfect, and the subsequent will or codicil is cancelled or otherwise destroyed. If this exception were not allowed, *wills might be defeated*

by parol evidence that subsequent wills had been made and destroyed." (4th Rep. R. P. C. p. 34.)

In the present case no evidence whatever was given as to the destruction of the later instruments.

1854.

CURTO
against
GILBERT.
Judgment.

THE "BLENHEIM."

THIS was a cause of damage (by plea and proof), promoted by the brig "Unition" against the brig "Blenheim."

On the night of the 15th of December 1852, the "Unition" was off Flamborough Head, on her voyage from Newcastle to Jersey, laden with a cargo of coals, when she came into collision with the "Blenheim," which was proceeding in ballast from London to Middlesborough, in the county of York.

The "Unition" alleged *that* she was proceeding close hauled on the starboard tack to get into smoother water; *that* whilst so proceeding, a vessel (the "Blenheim,") was descried about two points on her lee bow, approaching on the larboard tack; *that* a light was then immediately exhibited from the lee bow of the "Unition," which continued on her then course; *that* no notice was taken thereof on board the "Blenheim," and no alteration made in her course; *that* the light was again exhibited and left for some time on the brig's lee bow, and the approaching vessel was loudly hailed to port her helm; *that* no light was shown on board the approaching vessel, and no alteration made in her course; *that* she thereby rendered a collision inevitable; *that* immediately before the collision, and in order to avert the same, if possible, the helm of the "Unition" was put hard to port, and she was brought aback with her head to the westward, but the "Blenheim," which was on the larboard tack, with the wind free, and proceeding very fast, improperly continued her course and ran with a heavy crash into the said brig, striking her in her gangway on the larboard side; *that* it being im-

THE HIGH
COURT OF
ADMIRALTY.

April 27.

A vessel is not relieved of her obligation to make way for another close hauled on the starboard tack by reason of her crew being engaged in reefing her topsails.

A vessel to which the blame of a collision is attributed is liable, not only for the immediate damage, but for the consequential loss arising from the abandonment of the injured vessel by her crew, under reasonable apprehension of danger.

Pleadings.

1854.

THE

"BLENHEIM."
Pleadings.

possible to ascertain what damage the brig had sustained whilst the two vessels were rolling together in the heavy sea, and there being reason to apprehend that the brig would go down from the injuries received, the crew, for the preservation of their lives, jumped on board the "Blenheim;" *that* after some time the vessels separated, and it being impossible for the said brig's crew to return to her in safety, the "Blenheim" took them to the port of Middlesborough, and landed them there; *that* the said brig, after being so abandoned, was fallen in with by the crew of another vessel, and navigated by them to the port of Great Grimsby, where she has since been given up to her owners, upon payment being made by them of the claims for salvage, amounting to 420*l.*; *that* the institution of the present suit was delayed by reason of the "Blenheim" having been out of the jurisdiction of this Court, &c.

The defence on the part of the "Blenheim" was, *that* in consequence of the violence of the wind, the master gave orders to close reef his topsails; *that* she was laid to for that purpose, with her head N. $\frac{1}{2}$ W., and all her crew, but the master and man at the helm, went aloft; *that* her helm was kept hard a-starboard, and she had scarcely any way on her; *that*, under these circumstances, the light of the "Union" was observed about three points on the "Blenheim's" lee bow, distant about half a mile; *that* as the "Union" approached without giving way as she was bound to have done, inasmuch as she had the wind free, and the "Blenheim" was laying to, as aforesaid, the said brig was loudly hailed to bear away, but *that* no attention was paid to such hailing; *that* the foreyard of the "Blenheim" was then thrown aback, and the helm of the "Union" was ported, but too late, &c. &c. *That* after the collision the vessels separated, *neither vessel having sustained any damage but of the most trifling character*; *that* the collision and its consequences were attributable to those on board the "Union" for not giving way and keeping clear of the "Blenheim" when that vessel was laying to, reefing, and quite unmanageable.

Sir J. D. Harding Q. A. and Dr. Deane appeared for the "Union;" Dr. Addams and Dr. Twiss appeared for the "Blenheim," and contended that she was not to blame, and that if she had been to blame, her owners were not fairly responsible for the consequential expenses, as the "Union" was but slightly damaged by the collision, but had been abandoned by her crew without just and sufficient cause.

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THE

"BLENHEIM"

Summing up.

The abandonment of the injured vessel by her crew is a question of law, and not a question for the consideration of the Trinity Masters.

Two questions

—1st. The conduct of the "Union."

2nd. The conduct of the "Blenheim."

The facts of the case as represented by the "Union."

Weather threatening.

"Union" seems to have been close hauled, for the purpose of going to the Humber.

Wind appears to have been variable.

DR. LUSHINGTON, addressing the Trinity Masters. (a) Gentlemen, there has been one question which has been agitated on the present occasion to which I do not intend to call your attention: I mean the question whether the "Union" was properly abandoned on behalf of her master and crew after the collision, or whether the crew precipitately left her. This is not a matter on which I feel authorized in asking your opinion. It does not depend on nice nautical points, but on considerations which those sitting in this chair are supposed capable of giving it. However glad I should be of your assistance, I must adhere to the law, and not improperly put questions to you.

There are, however, two questions which I must request you to consider, the first of which relates to the conduct of the "Union," and the second to the conduct of the "Blenheim."

You must allow me very briefly to recapitulate the facts of the case. It appears the "Union" was of the burthen of 150 tons, and was bound (laden with coals) to Jersey. The collision took place on the 15th of December, a few miles from Flamborough Head; and the weather at that time, as appears from all the evidence, was not, perhaps, to be called tempestuous, but was of a threatening character. I make that observation, because it is not only stated in the evidence on behalf of the "Union," but by that on the part of the "Blenheim," that the wind was W. by N., blowing heavily; that, at this time, in consequence of the violence of the wind, so and so was done. It was evident, therefore, that the weather was rather to be considered as threatening. It appears that the wind having blown S. for some time before, the master of the "Union," instead of keeping his proper course to Jersey, thought it right to seek shelter by keeping close to land. This appears to me to dispose of a question much discussed at the bar, namely, whether the "Union" was, at the time she met the other vessel, close hauled. I think if the wind was W. by N. and the proper course to Jersey was S. by E., she was not close hauled. If on the other hand she was keeping as close as she could to the shore, she was close hauled for the purpose of going to the Humber. Therefore, I think the only question that can arise is, whether the vessel was justified in abandoning her direct course and seeking the land.

Another question, much discussed, was the quarter from which the wind blew. So far as I can form any opinion, it was varying from W. S. W. to W. by N., but upon the precise quarter from which the wind blew at the moment of the collision the

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THE
"BLENHEIM."
Summing-up.

Was there any undue delay on the part of the "Unition" in porting her helm?

Statement of the "Blenheim."

The "Blenheim" ought to have shown a light to indicate her position.

"Blenheim" said to have been in an unmanageable state.

Was there sufficient reason for the non-compliance with the Act of Parliament?

evidence does not enable me to form an opinion. Under these circumstances, the "Unition," according to her statement, first saw the "Blenheim" two points on her lee bow, and, as soon as she perceives her, it is not disputed, she acted very properly in exhibiting a light. Finding that the other vessel does not change her course, she ports her helm, as I understand, at the moment, and then puts it hard to port, so as to bring her sails to shiver in the wind. However, it so happens that the other vessel came on, right or wrong, and struck her on the starboard side. It appears to me that there can be but one question arising on this point. Was there any undue delay on the part of the "Unition" in porting the helm? I cannot represent the "Unition" to be blameable in any other respect than by possibility in the one I am now suggesting for your consideration.

Now, with respect to the "Blenheim," she was a vessel of the burthen of 225 tons, and was bound, in ballast, from London to the North. According to her representation she was laid to, and reefing her topsails, with her head N. by W., and had her helm hard a-starboard. The master in his evidence states, that it was hard a-starboard at the time when the light was shown by the "Unition;" it was seen by the "Blenheim," but she takes no notice of it. Though it so happened, that the omission to show a light on the part of the "Blenheim," may not have been the cause of the collision, yet I must say it was exceedingly erroneous conduct on the part of her master not to have shown a light to point out the place and position of his vessel. The "Blenheim" represents that she was in an unmanageable state: what ought to have been her conduct? According to the evidence of the master of the "Blenheim," it appears she did nothing.

[The Court, having read a portion of the master's evidence, continued.] It will be for you to determine whether she ought to have done anything, or whether there was any sufficient reason for not doing that which the Act of Parliament prescribes, namely, porting her helm. If you are of opinion that she could not do it, then the maxim of law prevails, *Nemo cogitur ad impossibilia*. If you are of opinion that she might have ported her helm, then she is to blame for the collision. You will have the kindness to give me your opinion on that point.

Judgment.

CAPTAIN FARQUHARSON. We are of opinion that the "Blenheim" might have ported her helm, and we think the "Unition" acted rightly in the course she pursued; that she was not to blame. The Trinity Masters having withdrawn,

DR. LUSHINGTON continued. Now with respect to the question of the abandonment of this vessel by the master and crew, it having been determined, in consequence of the opinion of the Trinity Masters, that the "Blenheim" was to blame for this collision, I must determine whether the usual consequences which would result on such a decree ought not to take place on the present occasion, because blame is attributed to the master and crew of the "Unition" in abandoning her. The principle to which I have always adhered, and to which I shall adhere, until otherwise instructed by superior authority, is, that when a collision takes place on a dark night, particularly at a tempestuous period of the year, and when the vessel producing the collision is of greater burthen than the one struck, I cannot possibly settle with satisfaction to my own mind, or security to justice, what ought to be the reasonable extent of fear and apprehension to the crew of the vessel so struck. It is impossible for any court of justice to say with any degree of certainty what are the precise circumstances that would justify the abandonment of a vessel. If there be any reasonable prospect that the lives of the crew are endangered, I have determined, and I will do so until I am overruled, that they are justified in quitting the vessel, and the consequences must fall on the wrong doer. On the present occasion the vessel was off Flamborough Head, and it is manifest from the evidence on both sides, that though there cannot be said to be a gale of wind or a storm, yet the weather was approaching to tempestuous, and the wind was blowing violently. The occurrence took place on the 15th of December, at night, when it was impossible for them to know the weight of the vessel that had struck them or the extent of damage that was done, and I therefore cannot think that they were bound to remain on board. The delay of two minutes might have risked valuable life, and I never will put life in competition with property. In the present case, there is nothing to induce me to depart from the ordinary rule of condemning the "Blenheim" in the damage done.

Proctors: for the "Unition," *Bathurst*; for the "Blenheim," *F. Clarkson*.

THE "PARIS."

THIS was a salvage suit promoted by the steam-vessel "Douro," against the steam-ship "Paris."

The "Douro," a steam-vessel, on her voyage from Constantinople to Southampton, fell in with the "Paris" in the

1854.

THE
"BLENHEIM."
Judgment.

The crew of the "Unition" were justified under the circumstances in abandoning their vessel.

THE HIGH
COURT OF
ADMIRALTY.

April 21.

A steamer bound from the East to Southampton, meets another, disabled in her

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THE
"PARIS."

machinery, in the Bay of Biscay, and tows her to Plymouth Sound. The service lasted about forty-eight hours, and the value of the property saved was 4060*l*. A tender of 800*l*. was upheld, and the salvors condemned in costs.

Judgment.

Bay of Biscay on the 1st of December 1853. The "Paris" was proceeding in ballast from Havre de Grace to Marseilles, when her machinery sustained such injury that she was quite disabled. She hoisted a signal of distress, which brought the "Douro" to her assistance. The "Douro" took her in tow, and brought her safely to Plymouth Sound, where she arrived on the 3rd of December. The value of the property saved was 4060*l*. The owners tendered 800*l*., which was rejected.

Dr. R. *Phillimore* and Dr. *Twiss* appeared for the salvors; Sir J. D. *Harding Q. A.*, and Dr. *Deane* for the owners.

DR. LUSHINGTON. As my judgment will not be influenced by any of those matters which have been so much controverted, it is not my intention to enter minutely into their consideration, because I intend to determine this case on the great features of it. The question is this, bearing in mind always the value of the property which has been saved, namely, 4060*l*., and the amount which has been tendered, namely, 800*l*., or one fifth of that sum, whether, looking at the general facts of the case, that is a sufficient and competent reward for the services which have been rendered.

Now, what are the ingredients in this case so often described in this Court, which appear to render it incumbent on the Court to pronounce for a large rate of salvage? Certainly, the vessel which performed the service is one of considerable power, one fully competent to perform the duty she undertook with rapidity and efficiency.

The "Paris" is represented to be of the burthen of 200 or 230 tons, and she, I must think from the whole evidence in the case, was in a state of considerable peril; but the degree of peril, it would, in my judgment, be impossible to ascertain with anything like satisfaction to my own mind. True it is that the engines were disabled, and that her canvas was insufficient to carry her to a French port; but we must all feel this, that the incapacity to reach a French port must depend on circumstances which it was so impossible to know beforehand, that no great reliance could be placed on it. I mean this: assuming it were to continue calm, and presuming the wind to be favourable, then much less canvas might render it safe to navigate the ocean than under other circumstances, and there would be a probability of reaching the French coast.

But, be that as it may, there is no doubt that she was in a state of danger, and she considered herself so to be, because she made a signal of distress, and asked to be taken in tow, thereby showing that she doubted her own capacity to reach

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 THE
 "PARIA"
 Judgment.

a place of safety. She is accordingly taken in tow, and it does not appear to me that, after she was taken in tow, the "Douro" underwent any peculiar hardship in the performance of the service, or that there was any great degree of danger occurring to the "Douro" herself, and I am not satisfied that there was danger of any kind whatever incurred by any one in performing the service.

With regard to the repair of the machinery, and other services rendered, the Court takes it into consideration. Yet it is a matter which occurs every day, that the vessel salving assists the vessel saved, not in repairing machinery, because that is not a frequent occurrence, but putting her in that state and condition in which she is enabled to proceed from one port to another. The vessel taken in tow is conducted to Plymouth, which was in the course of the "Douro," though she would not have stopped there, but have gone on to Southampton. According to the representation, forty-eight hours are lost, and one fifth of the value is offered for these services.

I must say, I think the salvors have seen the whole case through a magnifying glass. They magnify the value, the size of the vessel, and their own services, and, though I act upon the principle, that where efficient services have been performed, by a steamer of great value and great power, with alacrity, she ought to be encouraged to embark in such undertakings, yet, I think there is a line which, if there be an attempt to overstep, it is the duty of the Court to interpose.

Now, in my judgment, one fifth of the property is an ample reward. If the vessel had been derelict, I certainly know no instance in which where the value was so great, more would have been given; but a derelict she was not. I consider it my duty to pronounce for the tender; and, I am sorry to say, to condemn the parties in the costs. That is a measure which I am reluctant to pursue, though, according to the practice in other Courts, where the tender is considered sufficient they uniformly follow that course. I have considered myself justified in some cases in not proceeding to that extremity, on grounds of public policy (a), but in this case I see no sufficient grounds for departing from the rule.

Dr. R. Phillimore. Will the Court kindly apportion the salvage?

DR. LUSHINGTON. I think a fair apportionment will be 200*l.* to the owners, 120*l.* to the master, and the rest to be divided among the crew according to their rating in the articles.

(a) *Vide* note, p. 175.

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THE
"ARIS."
Judgment.

Dr. R. Phillimore. One difficulty about receiving the tender was that of making an apportionment of it.

Proctors: for the salvors, *Middleton*; for the owners, *Nicholson*.

CONSISTORY
COURT OF
LONDON.

April 22.

A vessel was lying at Melbourne in Australia, when H. C., who had been some time resident there, shipped on board as an able seaman to return to England. The vessel did not sail for some days after. Irregular papers of H. C., dated the very day on which he shipped, not entitled to probate as a mariner's will under sect. 11. of the statute.

Statement.

IN THE GOODS OF HENRY CORBY, DECEASED.

HENRY CORBY, late a seaman on board the merchant-ship "*James Alexander*," died on the 24th of June 1853, at sea.

He left England, in October 1850, for New Zealand, whence he afterwards, in May 1852, went to Australia. He there acquired property amounting in value to about 250*l*.

On the 15th of March 1853, he was shipped as an able seaman on board the above vessel, which was then lying at Melbourne, in Australia, to work his passage home, and he remained on board that vessel until his death.

On the 1st of August 1853, Mr. Thomas Corby, a brother of the deceased, received a letter from him, dated 15th of March 1853 (being the day on which he shipped on board the "*James Alexander*"), in which he mentions that he is in that ship, and he concludes the letter thus: — "You can draw it (meaning his money) if I never reach home. Should anything happen to prevent, I leave it all to do as I say, on inquiring of the *Shipping List*, and my last letter is, what to do with what I owe as my own." On the 20th of the same month, Mr. T. Corby received another letter from the deceased, dated Melbourne, March 6th 1853, in which he mentions his intention to leave Australia on his return to London, on the 15th of March, and adds, "It is understood that all I possess will belong to my nephews and neices, should I not reach home in safety," and he then specifies what his property consists of. It appears that no other letter, bearing date between the 6th and 15th of March, was received from him.

On the 1st of August 1853, Mr. Rogers, the brother-in-law of the deceased, also received from him a letter, bearing date 15th of March 1853, and in which he states that he is shipped in the "*James Alexander*," and that should he not reach home in safety, he, Mr. Rogers, is to see the deceased's brother Thomas, and he adds, "You and he can receive the money, and afterwards, if anything should happen to me, you must then make inquiries about me, and you will find what property I am possessed of to my nephews and neices." And the following addition is written across the page, "My brothers William and Thomas will arrange all business, and share and share alike."

These three letters were all in the handwriting of the deceased, but the first was not signed.

On intelligence of his death being received, search was made among his boxes and effects for some more formal testamentary instrument, but without success.

Dr. *Middleton* moved the Court to decree probate of the will of the deceased, as contained in the three paper writings, &c., to Mr. Thomas Corby, as the surviving executor, according to the tenor, and submitted that the circumstances of the case entitled the deceased to the privilege of the exception of the 11th section of the Wills Act, as a "mariner or seaman being at sea," citing the case of *Lay. (a)*.

Per Curiam. You ask for probate of these papers as a seaman's will, but have you any evidence that he was on board ship at the time he wrote them?

Dr. *Middleton.* The evidence is to the effect that he was shipped, as a mariner, on board this vessel on the day when the papers bear date.

Per Curiam. It seems to me running it rather close to say that he was a mariner, when he made his will only on the very day when he was shipped, and when the vessel was in a British port. It is a very nice question, which the Court must take time to consider.

On a subsequent day DR. LUSHINGTON rejected the motion, and said, This case I have taken time to consider, as the question involved appeared to me of considerable importance, and it was my anxious wish to grant the motion for probate of these papers, if I thought I could do so consistently with my apprehension of the law. These papers are not executed according to the requirements of the statute, and the application is for probate of them as privileged under the 11th section. That section, however, applies only to wills made at sea. Now, in the present case, there is no evidence whatever where these papers were written, nor whether the deceased was even on board the ship at the time. It appears that the deceased had not originally sailed to Australia in this vessel, but that he had been residing there for nearly a twelvemonth before he shipped as a mariner to return in her to England, and that he so shipped on the 15th of March. Now the paper marked A., bearing date the 6th of March, I think, must be put out of consideration altogether, as being clearly not entitled to the privilege. But with respect to the other two papers, it is a

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CORBY.*Judgment.*

different question. They both bear date the 15th of March, on which day, it appears in evidence, the deceased shipped on board this vessel, as a mariner, to return to England. But, assuming that these papers were actually written on board this ship, I am not prepared to say they would be entitled to probate as a mariner's will, for it must be borne in mind that the statute says, "mariner or seaman being at sea," and it appears that this vessel did not sail till the 30th of March, fifteen days afterwards. Can it then be said that these papers were written at sea, within the true meaning of the statute? I think not.

I am aware of the case of *Lay* (a), but the circumstances of that case appear to me totally distinguished from the present. I must reject this motion.

Proctor: *Middleton.*

(a) 2 Curt. 375.

PREROGATIVE
COURT OF
CANTERBURY.

April 28.

A soldier under orders to proceed from his station in one Indian presidency to take part in the war going on in another, and making his will only two days before he commenced the march, is not entitled to the privilege of a military testament.

Statement.

BOWLES *against* JACKSON.

On Admission of the Allegation propounding the Will.

THE will of the deceased was propounded on behalf of the widow and universal legatee.

The second article, which pleaded the execution, was to the following effect: *That* Alfred Jackson, the deceased, in the year 1839, was a captain in the 30th regiment of Bengal Native Infantry, and in the month of August, in that year, was stationed with his regiment at Neemuch, in Bombay, in the East Indies; *that* on the 14th of that month orders were received by the commanding officers of the regiment to march on the 22nd of the said month to attack the citadel of Joadhpore, a fort belonging to an independent prince of that country; *that* on the 20th of the said month the said testator, &c. did, with his own hand, draw up, and write his last will and testament, of which the paper exhibited, and remaining in the registry of this Court, is an authentic copy, and signed the same on the said day, and acknowledged the same as his last will and testament, in the presence of Hercules Ross, who, at the request, and in the presence of the deceased, set and subscribed his name as a witness thereto; *that* the said deceased afterwards took the said will to the house of T. Morrison, and in like manner acknowledged the same to be his will, in the presence of the said T. Morrison, who then, in the presence, and at the request of the said deceased, signed and attested the said will as a witness thereto, &c.

The third pleaded: *That* on the 22nd of the said month of August, in the said year 1839, the said deceased, agreeably to

the said orders so received on the 14th, as mentioned in the preceding article, marched with his said regiment, in order to attack the said citadel of Joadhpore, and whilst on the said march was seized with illness, and sent back to Musseerabad, where he died on the 13th of October following.

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The fifth, article pleaded the 11th section (a) of the Wills Act.

Dr. Jenner, on behalf of the next of kin, opposed the admission of this allegation.

Argument.

This is an amicable suit for the purpose of obtaining the opinion of the Court as to whether the circumstances pleaded are sufficient to entitle the deceased to the privileges of a soldier in "actual military service." The facts are stated in the 2nd article. The fact relied on to distinguish this case from the various cases already decided is, that, at the time of the execution of the will, the deceased was under orders to march to battle. But, is being under orders to march and engage in actual military service precisely the same thing as being in actual military service? If so, the argument must go to this length, that every soldier under orders to march for any purpose whatever is privileged. At the present moment this would embrace a very large class. Many are now under orders to proceed to Constantinople. The words of the Act do not seem to allow such an extension of the privilege. Being a privilege and an exception from the general operation of the law, it must be construed strictly, and must not be unduly extended. The time can have no bearing on the case. The fact of the deceased's marching two days after the execution of the will cannot stamp the character of actual military service upon him at the time of execution. The case which has the nearest resemblance to the present is that of *James Norris* (b), who, at the time of making his will, was under orders to proceed from Malta to the West Indies.

Per Curiam. He was under orders to proceed to the West Indies, but was he going to attack any place? That would seem to make a great difference in the nature of the orders.

Dr. Jenner. No; his orders were not to that effect. In that respect, certainly, the case differs from the present.

Dr. R. Phillimore, *contrà*.

The decisions already given in this Court render any elaborate argument unnecessary. We must show that, under the circum-

(a) Provided always and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may

dispose of his personal estate as he might have done before the making of this Act.

(b) 3 Notes of Cases, 197.

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stances, the deceased is to be considered either in *castris*, in *expeditione*, or in actual battle-field. The cases of *Drummond v. Parish* (a), *White v. Repton* (b), of *Major-General Clement Hill* (c), and of John Vaux Leese, (d), are all cases which show what is not actual military service; but there is a circumstance in the present case which distinguishes it from them. The deceased was under orders to march and engage in immediate hostilities.

There appears to be a difference between India and the colonies, from the fact of our Indian possessions being surrounded by independent powers, which renders the principle of the *Digest* respecting the vicinity of the danger more applicable.

The inclination of the Court will be to sustain this will, if it can possibly do so, as these wills are always favourably received in these Courts. Sir *Leoline Jenkins* originally obtained the privilege for the British soldier and sailor, that their position might not be inferior to the soldier and sailor among the Romans.

The doctrine of the Roman Law, as stated by *Ulpian* is: "*Ex eo tempore quis jure militari incipit posse testari, ex quo in numeros relatus est; antè non: proinde qui nondum in numeris sunt, licet etiam lecti tirones sint et publicis expensis iter faciunt, nondum milites sunt, debent enim in numeros referri.*" (e)

Per Curiam. But I apprehend that only makes the difference between soldiers and mere recruits, without touching the question of actual service.

Dr. R. Phillimore. Yes; but he says the privilege began to run from that time; and it is so explained by *Calvin* (f) in the word "*Numeri.*" But *Calvin's* definitions of the words *expeditio* and *expediti milites* are more important, and seemed to have been regarded with great attention by the learned Judge in the case of *Drummond v. Parish*. (g) He says: "*Expediti milites vel in expeditionibus existentes dicuntur, quicunque sunt in ipso exercitu aut castris, id est, eo loci, quo Reipublicæ causa est belli apparatus, seu in statione illi sint, seu in hibernis seu aliubi pro finibus Imperii tuendis; imo quocunque in loco sint militiæ causa, ut si Romæ sint ad defensionem urbis collocati ac dispositi. Falsum ergo, stationarios ac limenarchas non recte testaturos jure militari quia non sint in expeditionibus.*"

This definition may fairly be applied to the circumstances of the present case. Captain Jackson was stationed with his regi-

(a) 3 Curt. 522.; 2 Notes of Cases, 318.

(b) 3 Curt. 318.; 3 Notes of Cases, 97.

(c) 1 Robert. 276.; 4 Notes of Cases, 174.

(d) 17 Jur. 216.

(e) Dig. 29. 1. 42.

(f) *Calvin's* Lex. Jur. vv. "*Numeri,*" "*expeditio,*" "*expediti milites.*"

(g) 3 Curt. 535.

ment where he was *pro finibus Imperii tuendis*, and he was certainly *eo loci quo Reipublicæ causa est belli apparatus*. He was, in fact, on the point of war, being under immediate orders to advance to the attack of a fortress. If he had made his will two days later — at any time on the 22nd, no one could have contended that it was not valid.

Looking at all the circumstances of this case, that there is no decided case against the validity of this will, that the officer was ordered out of his own presidency into another where the war was going on, and that he actually set out within forty-eight hours of the date of the will in obedience to orders received several days before, the Court will see that the reason of the privilege being granted to soldiers is brought out very strongly by the facts which show emergency and impending danger.

SIR JOHN DODSON. To a certain extent, that may be true; but it does not appear to me that the circumstances of this case are such as to show this soldier to have been *inops consilii*. In point of fact he was at home, — in a different presidency, in different British territory from the seat of war, and had as full opportunity of making a will as any other person. The orders to march were not immediate; he had full time to make, and he did make a will; but, unfortunately, not in accordance with the requisites of the law. The signature was not made in the simultaneous presence of the witnesses.

I am of opinion that in this case, the military privilege does not apply. It cannot be said that at the time this will was made, this gentleman was *in expeditione*. What might have been the case if he had actually set off, it is not necessary for the Court to consider. The cases cited, though none of them precisely to the point, show that the soldiers stationed in the colonies, even under orders of removal, are not privileged. Here is certainly a distinction, inasmuch as the party was under orders to proceed to the immediate scene of hostilities; but I do not think it sufficient. The irregularity of this will is not founded on the want of opportunity to make it in a regular form, and I cannot hold it entitled to the privilege.

I shall reject this allegation, and thereby give the parties the opportunity of appealing to the Superior Court in order to get this point decided.

Proctors: for the widow, *Townsend*; for the next of kin, *Tatham*.

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BOWLES
against
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Argument.

Judgment.

1854.

THE HIGH
COURT OF
ADMIRALTY.

May 7. & 8.

A brig proceeding in a cause of damage barred of recovery by reason of her non-observance of the Admiralty regulation respecting lights having occasioned the collision.

THE "FAIRY."

THIS was an action brought by the brig "Kirtons," against the brig "Fairy," for damage sustained by an alleged collision between them off Cromer, about 8 o'clock p.m., on the 26th of February 1853.

The proceeding was by plea and proof. The point principally in dispute was the identity of the vessel proceeded against, for the "Fairy," though she admitted that she had been in collision with a vessel that evening, denied that it was the "Kirtons." The evidence and argument upon this point ran to a considerable length, but the case was decided upon entirely different grounds.

Sir *J. D. Harding* Q. A. and Dr. *R. Phillimore* appeared for the "Kirtons," Dr. *Addams* and Dr. *Twiss* for the "Fairy."

DR. LUSHINGTON, having summed up fully, and having put certain nautical questions to the Trinity Masters (a) upon the question of identity, said: There is another point not touched upon by the counsel, either upon the one side or on the other, to which it is my duty to call your attention. It does not appear that a light was hoisted or shown at all on board either vessel. You know perfectly well that I have to carry out the provisions of an Act of Parliament with reference to that matter. The question then arises, whether, under the circumstances, the "Kirtons" ought not to have hoisted a light as soon as she descried the vessel approaching on the starboard tack. I do not know that you will have much difficulty in solving that question.

The next question is, however, one of great difficulty; because, according to the 28th section of the Act of Parliament, we must see whether the not exhibiting a light was the cause of the collision. I shall be under the necessity of asking you whether the collision was occasioned by the non-observance of the rule of hoisting a light. If the collision was occasioned by that neglect, then it will be for the Court to determine the case according to the true construction of the statute.

The Court and Trinity Masters retired for consultation; and, on their return, DR. LUSHINGTON, after stating the opinions of the Trinity Masters upon the questions respecting the identity of the "Fairy," continued:—

With regard to the next part of the case, it appears that neither ship showed a light. The Trinity Masters are of

(a) Captain Farrer and Captain Pelley.

opinion that it was the duty of both ships to show a light. They are further of opinion that if the duty had been complied with, there would have been no collision; consequently, they are of opinion that the neglect to show a light, was the occasion of the collision. I concur in these opinions. Under these circumstances, the "Kirtons" cannot recover.

If it should be the desire of the parties that I should give my opinion on the question of identity, I will do so on some future day; but the evidence upon the point is so circumstantial, that I must take time to consider it.

Sir *J. D. Harding* Q. A. If the Court thinks that its decision upon the identity would affect the question of costs, we should like to have its opinion.

THE COURT. No; I cannot think it would in any way affect the costs.

Proctors: for the "Kirtons," *Loveday*; for the "Fairy," *F. Clarkson*.

1854.
THE
"FAIRY."
Judgment.

THE "AFRICA."

THIS was a suit for salvage, promoted by the steamer "Dumbarton Youth," against the "Africa." This vessel, laden with a general cargo, having taken the ground in the Old Calabar river, the steamer was engaged four days, from the 26th to the 29th of December 1851, in lightening and towing her off.

In the first instance, the captain of the steamer proposed to give her services in consideration of receiving merely her daily expenses, and the services were performed. The sum of 132*l.*, the amount to be received by the steamer according to this agreement, was tendered and rejected. The salvors alleged that, after the service was completed, this agreement was by mutual consent cancelled. The circumstances of the cancellation are fully detailed in the judgment. The value of the property salvaged was about 30,000*l.*

Dr. *Jenner* and Dr. *R. Phillimore* appeared for the salvors; Dr. *Bayford* and Dr. *Twiss* for the owners.

DR. LUSHINGTON. The original service which was performed in this case, is not denied to have been a salvage service. With respect to the merits of the service, that may be a

THE HIGH
COURT OF
ADMIRALTY.

April 29.

An agreement for the services of a steamer to assist a vessel which was aground having been made, and the services completed under that agreement, it was subsequently cancelled by the mutual consent of the masters of the two vessels. The owners cannot set up such agreement as a bar to a suit for salvage.

In foreign countries, where the custom prevails of rendering mutual assistance without claiming salvage reward, steamers

would not be bound by the custom as regards sailing-vessels, there being no mutuality between them.

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THE
"AFRICA."
Judgment.

The service being clearly of a salvage nature, the only question is, whether the claim is barred by any agreement.

The question of the agreement must be judged by the evidence produced by the owners.

The circumstances of the alleged agreement.

The owners of the respective vessels are bound by the agreement of the masters.

matter of consideration presently; but having been in itself a rendering of assistance to a ship which had become fast on the ground, the steamer herself partly unlading the cargo, it follows as a matter of course, that it is the duty of the Court to give such compensation as it may think fit, under all the circumstances, unless it is barred by any valid agreement made between the parties, and which is a subsisting agreement.

I address myself, therefore, at once to the question, whether there is any valid agreement subsisting which justifies the owners in saying, "We abide by the agreement, and have made a tender in its terms, consequently we are entitled to have it accepted, and to be dismissed with our costs." It so happens, that on the present occasion, the Court has no evidence on the part of the salvors with respect to this agreement. It has been truly stated, therefore, that I must take the representation which is to be found on the part of the owners to see, not only whether there was originally a valid agreement, but whether it has been in any way cancelled.

The facts stated in the act on petition on behalf of the owners are as follows:—It is alleged, "*That* on Captain Kirby coming on board the 'Africa,' he volunteered to stay by the ship until the following flood, and try to tow her off, saying, that if she came off that evening's tide, he would not make any charge." Now, she did not come off that evening's tide, therefore, nothing further arises with respect to that part of the averment. "*That*, on the flood, the steamer was lashed alongside the ship, and so attempted to tow her off the bank, but without success. *That* Captain Cuthbertson, therefore, determined to lighten his vessel, and Captain Kirby agreed to give the services of his steamer, on payment of her actual daily expenses, which Captain Cuthbertson agreed to pay."

Now, this is the averment of an agreement between the parties, and, assuming it to be true, which I am bound to do under the circumstances of this case, it binds Captain Cuthbertson, the agent of the owners of the vessel of which he was master, to cause payment to be made of the actual daily expenses, whatever they might be, and it binds Captain Kirby and his owners, he being their agent, to accept the sum. Respecting that sum, there can be no doubt. It was a mere verbal agreement. The act on petition goes on to say, "A conversation afterwards ensued, as to the remuneration to be paid for the services of the steamer, and on such occasion Captain Kirby again repeated that all he wanted was her actual daily expenses, and he named each item separately." Now, it is rather singular that after this agreement was stated to have taken place in the

direct terms in which it has been in the act on petition, there should be any further discussion on the agreement, except for the purpose of ascertaining what was the amount of expense; however, I do not rely on this. The agreement was considered to be a continued subsisting agreement until the transaction occurred, to which I am now about to advert.

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THE
"AFRICA."
Judgment.

On the morning of the 31st of December, Captain Kirby came on board the "Africa," and in the cabin of that vessel wrote out an order on Messrs. Wilson and Dawson, of Liverpool, the owners of the ship "Africa," in favour of Messrs. Charles Horsfall and Son, the owners of the steamer, for the sum of 132*l.*; namely, for four days' expenses, at the rate of 33*l.* a day, such being the rate agreed upon as pre-alleged, in the words, or to the effect following. This appears to me to have been at that time a carrying on of the original agreement which was entered into; and following it up by a species of payment therein set forth.

Agreement
cancelled by
the masters.

It appears that Captain Kirby then requested Captain Cuthbertson to sign the paper, which he did, and returned it to him; that very shortly afterwards, and before he left the cabin, he observed to Captain Cuthbertson, that on consideration, it would perhaps be better if the owners themselves were to arrange the payment; that is, in other words, a proposition on the part of Captain Kirby that the agreement should be put an end to, because it was inconsistent with the agreement, that the matter should be left to further arrangement. It is said, "He put him off his guard, by adding, that perhaps Messrs. Horsfall might not take so much, and that Captain Cuthbertson then remarked to him, that it was not unlikely that Messrs. Horsfall would think the sum too much for friends to pay; and thereupon Captain Kirby tore up the aforesaid original order in the cabin of the 'Africa,' in the presence of Captain Cuthbertson."

Now, if any representation had taken place on behalf of Captain Kirby, which at all savoured of fraud, undoubtedly, whatever occurred on this occasion would be entirely vitiated, and the agreement remain in force. But it is impossible that I can so construe this representation, because in the opinion of Captain Cuthbertson, it was a favourable result on that occasion. This document is then torn up; and it does not appear that any objection was raised on the part of Captain Cuthbertson, or that there was any remonstrance whatever; on the contrary, he proceeds to write the letter to which I must here refer:—"I do hereby certify that the steamer 'Dumbarton Youth,' has lightened the ship 'Africa,' also has towed the said ship to Calabar, occupying four days, and that Captain Kirby, with his

There is no
appearance of
fraud to vitiate
such cancella-
tion.

1854.

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"AFRICA."
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crew, have rendered me every assistance, for which services and expenses you will arrange with Messrs. Charles Horsfall and Sons, 1. Exchange Buildings, Liverpool.

"CHARLES CUTHBERTSON."

Does this, or does it not amount to a cancellation of the verbal agreement which had been entered into three or four days before? Now, what is the representation which is made on behalf of the owners on the present occasion?

An agreement cannot be cancelled as regards one party, but subsisting as regards the other.

It is said that Captain Cuthbertson never intended to cancel the agreement at all, and was actuated by no such motive; on the contrary, what he intended to do was, to keep it a valid agreement, so that his owners never should be compelled to pay more than 132*l*., but might take the chance of its being less. But Captain Kirby could not mean to say, when he took part in this transaction, "I am content to vary that agreement at my own instigation, for the purpose of giving my owners an opportunity of accepting less than the sum stated in the agreement." It appears to me that the document is wholly inconsistent with the view the owners took of it. It is a clear cancellation by both the contracting parties, and it was intended to leave it to the owners at Liverpool to settle for these services. It is contrary to all principles of justice, that the one party should be bound not to receive more than 132*l*., with the probability of having it reduced, but no chance of its being increased. I am bound to consider the case as if no agreement had ever taken place.

Agreement being at an end, the Court must consider the service as if no agreement had ever existed.

In looking at the tender of 132*l*., it is clear, to my mind, that I must increase it; and for this obvious reason, it is merely a payment for expenses, without any reward for services rendered. It has been contended, that it is customary for vessels in that part of the world to render assistance without compensation, and no doubt the custom, to a certain extent, is proved by the evidence. It is consistent with all probability, that vessels in that country, where it is difficult to procure assistance, should render salvage services on different terms from those which prevail in this country. But, assuming the custom to be so, I should have considerable difficulty in extending it to the case of a steamer, because there is no mutuality in the case of steamers and sailing-vessels. The case then comes simply to *quantum*. Looking at all the circumstances, I shall allot the sum of 400*l*.

Proctors: for the salvors, *Jennings*; for the owners, *Tebbs*.

"NOSTRA SENORA DEL CARMINE."

THIS was originally an action on a bottomry bond on the ship, cargo, and freight, for the sum of 390*l.* 12*s.* 6*d.* The action was entered for 500*l.* Bail was given for the owners of the cargo in the sum of 350*l.* to answer the action so far as regarded the cargo. On the 7th of December last the Court pronounced for the validity of the bond, and decreed the sale of the ship.

The sum of 129*l.* 0*s.* 5*d.*, the amount of freight and primage due for the transportation of the cargo, and the sum of 190*l.*, the proceeds of the sale of the ship, were brought into Court.

An action having been entered on behalf of the seamen for wages, and their claim amounting to a very considerable sum, an application was made to the Court on behalf of the bondholders to be allowed to settle such claims, and afterwards to receive the amount, out of the proceeds of the ship and freight. Notice of the application was given to the proctors of the owners of the cargo; and no opposition being offered, the Court directed the wages to be paid, referring the amount to the registrar. They amounted, with costs, to 244*l.* 19*s.* 11*d.* This sum was accordingly paid by the bondholders, who subsequently received the amount out of the registry on their giving the usual bail to answer latent demands.

The proctor then received the balance remaining in the registry, amounting to 74*l.* 0*s.* 6*d.*, in part discharge of his bill, which had been taxed at 92*l.* 17*s.* 2*d.* The bond, amounting to 390*l.* 12*s.* 6*d.*, being still unpaid, and a balance of 18*l.* 16*s.* 8*d.* being still due to the proctor for the bondholder, he wrote to the proctor for the owners of the cargo, informing him that in addition to the sum of 350*l.*, the amount of their bail, a further sum of 59*l.* 9*s.* 2*d.* would be required. To this the proctor for the owners of the cargo replied by tendering a cheque for 350*l.*, the amount of the bail given.

Dr. *Deane*, on behalf of the bondholder, now moved the Court for a monition against the owners of the cargo for payment of the sum of 390*l.* 12*s.* 6*d.* (the amount of the bottomry bond), together with current interest thereon at the rate of 4*l.* per cent. from the 8th of October last, when the same became

1854.

THE HIGH
COURT OF
ADMIRALTY.April 27.
May 8.

A bottomry bondholder entered an action against the ship, cargo, and freight. The owners of the cargo appeared, and gave bail in the sum of 350*l.* The proceedings were in *panam*. The bond was pronounced for, the ship sold, the proceeds of sale and the freight were brought into the registry. The claims for wages, which proved unexpectedly heavy, having been settled, the deficiency on the ship's account for the bond and proctor's costs amounted to 409*l.* 9*s.* 2*d.*, which the owners of the cargo were called upon to pay. They tendered 350*l.*, the amount of their bail. Motion for a monition against the owners of the cargo to pay the balance rejected. *Held*, that though the master may become *ex necessitate* agent

of the owners of the cargo, he can render them liable only to the value of the cargo; that any liability beyond that can arise only from the conduct of such owners in contesting the validity of the bond; that they cannot be liable to costs not occasioned by their conduct; that the amount of their bail is the limit of their liability, as regards the bond; that the bail might have been taken to the full value of the cargo; and that its not having been so taken was the act of the bondholder himself, who must abide by the consequence.

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"NOSTRA
SEÑORA DEL
CARMINE."

due; and also for payment of the sum of 18*l.* 16*s.* 8*d.*, being the balance of the proctor's bill.

He said he could find no case precisely in point, but argued in favour of his motion from analogy, and referred to "*The Dundee*" (a), "*The Volant*" (b), "*The Hope*" (c), and "*The Kalamazoo*." (d)

Dr. Addams, *contra*.

THE COURT took time to consider its decision.

May 8.
Judgment.

DR. LUSHINGTON, having stated the circumstances under which the application was made, continued:—Thinking this was a question which deserved the attention of the Court, I accordingly took time to consider it, and applied my mind to it, to see whether there was any case to guide my course of proceeding, and next whether there was any principle.

In cases of
bottomry, the
value of the
cargo is the
limit of its
owner's
liability, as
far as the bond
is concerned;
and

It is a question which involves the liability of the owner of a cargo where the cargo is included in a bottomry bond. It appears to me clear that, in the first instance, the cargo itself, or its value, must be the limit of that liability. I think so for several reasons. It is and reasonably may be competent to the master of a ship to render the property liable to a bottomry bond; but the master is not the agent of the owner of the cargo *generally*; he may become so *ex necessitate* as to the cargo under his charge, but on no principle can the master, as I apprehend, impose upon the owners of the cargo a personal liability as to third parties; and liability to pay costs is a personal liability. Nor, indeed, do I know any case whatever in which this has been done under any circumstances, and I have searched for the purpose of discovering if any such existed.

if they do not
contest its
validity, they
cannot be
liable to any
costs.

Again, in the case of bottomry, when proceedings are taken against a ship and cargo, the owners of the cargo may oppose the validity of the bond or not, as they deem fit. They may leave the cargo under arrest, and allow it to be sold; they may not appear to the suit if they do not think it necessary. In such case it is clear that they cannot be made responsible for any costs, howsoever incurred.

The bond-
holder may
require bail to
the full value
of the cargo;
not doing so
is his own act,
of which he
must take the
consequence.

The owners of the cargo may, however, as in this case, appear and give bail, and the bondholder is entitled to require bail to the full value of the cargo. If he does not do so, it is his own act, and he must abide by the consequences.

I am of opinion that the liability of the owner of the cargo to costs depends on what is done afterwards. The bail, it is

(a) 2 Hagg. Adm. 137.
(b) 1 W. Rob. 388.

(c) 1 W. Rob. 154.
(d) 15 Jur. 885.

agreed on all hands, cannot be made liable beyond the amount for which bail was given.

If the owner of the cargo contests the suit, and fails, I should have no hesitation in condemning such owner in costs; the bail, to the extent for which it is given, might be also liable; but the owner would be liable beyond the amount of the bail, and for this reason,—bail cannot be demanded beyond the value of the cargo, but the owner, by contesting the suit, becomes liable, as every other suitor does, to costs, if unsuccessful. If the owner of the cargo was not liable for costs, he might give bail to the extent of the value, and then carry on an expensive litigation, free from liability to costs, and so diminish, if not annihilate, the value of the cargo.

It depends, therefore, upon the conduct of the owner of the cargo whether he becomes liable to costs or not.

Now, how are the costs in this case incurred? Solely and entirely on account of the ship. There are the costs of proceedings *in pœnam*, in no degree occasioned by the owners of the cargo, the costs of the action for wages, and the wages themselves. None of these costs have been occasioned by the owners of the cargo.

The cases cited,—the "*Hope*," and others,—are entirely in accordance with the decision I am to pronounce. The "*Hope*" was a cause of damage, and I might find many differences between a cause of damage and one of bottomry, if necessary; but I do not think it necessary to do so. The owners gave bail; they contested the suit; the bail was insufficient to meet the damage, and the Court condemned the owners of the ship to pay the costs, and very properly condemned them.

In the present case, if there had been a contest by the owners of the cargo, I should have had no hesitation in condemning them in the costs; but as they have done nothing to occasion costs, they are free from the liability. With regard to the bond itself, they have given bail for the cargo to the amount required, and their liability is exhausted by the money paid. Consequently, I am of opinion that I must reject the motion, the owners of the cargo not being liable to make good the bond, nor liable to costs in this case.

Proctors: for the bondholders, *Lawrie*; for the owners of the cargo, *F. Clarkson*.

1854.

"NOSTRA
SEÑORA DEL
CARMINE."

Judgment.

If the owners of the cargo contests the validity of the bond and fails, he becomes personally liable to costs, without regard to the value of the cargo.

In the present case, the owners of the cargo having occasioned no costs, are not responsible for any, and

neither they nor their bail are liable as regards the bond beyond the amount to which, at the requirement of the bondholder, the bail was given.

1854.

ADMIRALTY
PRIZE COURT.

June 21.

A vessel belonging to Bjorneborg, in Finland, sailed from Hartlepool to Copenhagen with a cargo of coals, which she there discharged, for the use of the British fleet, prior to the declaration of war, which took place on the 29th of March. She was unable to sail to Bjorneborg immediately after her cargo was discharged, by reason of the ice; but on the 10th of April she left Copenhagen, bound for that port, in ballast, and was captured on the 12th. Held, she was not protected by the Orders in Council.

Statement.“FENIX,” otherwise “PHCENIX,” *Silander.*

THIS was the first prize cause in the present war. The circumstances of the capture were as follows:—

The “Fenix,” otherwise “Phoenix,” was a barque belonging to Anton Bjorneborg, Isaac Carstrom, and Carl Martin, of Bjorneborg, in the Grand Duchy of Finland. In December 1853 she was in London, and had an advantageous charter-party for Lisbon, but, owing to the unsettled state of affairs between England and Russia she was ordered home to Bjorneborg. The charter-party to Lisbon was, therefore, given up at some sacrifice; and the London agent, in order, to some extent, to compensate the owners, directed the master to take a cargo of coals, and leave them at Copenhagen in passing, it being, at such time, impossible to enter Bjorneborg on account of the ice.

The “Phoenix,” therefore, left Gravesend for Hartlepool on the 31st December 1853; took on board a cargo of coals, and sailed from Hartlepool on the 15th February 1854; put into Copenhagen on the 20th of the same month, and delivered her coals for the use of the English fleet. The discharge was completed on the 19th March, but at such time, the ice still preventing her entering Bjorneborg, she was compelled to remain at Copenhagen.

War was declared on the 29th of March, on which day also an Order in Council (a) was published, “allowing Russian merchant, vessels, in any ports or places within her Majesty’s dominions, until the 10th of May, six weeks from the date thereof, for loading their cargoes, and departing from such ports or places.” This order appears to have been misunderstood, for the opinion prevailed at Copenhagen that Finland ships might proceed to their own ports unmolested up to the 10th of May. Accordingly, as soon as information arrived that the ice was broken up sufficiently to allow a vessel to enter Bjorneborg the “Phoenix” prepared to sail, and the Russian consul, in his official capacity, sent fifty-seven sailors, the crews of vessels which had been sold, on board the “Phoenix,” to be conveyed home to Bjorneborg.

She sailed from Copenhagen on the 10th of April in ballast, and, it appears, passed the English fleet unmolested; but upon the 12th she was captured, near Gothland, by her Majesty’s ship “Tribune,” and sent to London for condemnation.

The master, mate, and an able seaman were examined upon the standing interrogatories (b), and the case now came on for

(a) *Vide* Appendix, p. iii.(b) *Vide* Appendix, p. xiii.

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 THE
 "PHOENIX."
 Statement.

hearing, upon their evidence and the ship's papers. A claim was made for the vessel by John Gabriel Alcenius, of St. Bennet's Place, Gracechurch Street, London, ship agent, who made an affidavit "*That he was duly authorized to claim the vessel on behalf of Anton Bjorneborg, Isaac Carstrom, and Carl Martin, respectively residing at Bjorneborg, in the Grand Duchy of Finland, the true, lawful, and sole owners and proprietors thereof at the time when the same was taken and seized by her Britannic Majesty's screw steam-frigate "Tribune," Carnegie, Esquire, commander, whilst in the prosecution of a voyage from Hartlepool, in the county of Durham, by way of Copenhagen, to Bjorneborg, and brought to the port of London; that the claim thereunto annexed was a just and true claim; and that he should be able to make due proof and specification.*"

The Queen's Advocate (Sir J. D. Harding) and Dr. Jenner appeared for the captors; Dr. Addams and Dr. Twiss for the claimants.

Argument.

The Queen's Advocate took a preliminary objection to the form of the affidavit of claim. Though it might not be of any great importance in the present, it might be in future cases. Neither the affidavit nor the claim annexed stated any ground whatever upon which the claim was made. He certainly could not speak from any experience of his own, but he had availed himself of that of the learned Advocate of the Admiralty (a), who informed him that when a claim was made by an enemy it was always necessary to set forth on what ground the claim was made, whether under a license, under an Order in Council, or on what other ground. Unless such course were adopted, it would be impossible for the counsel for the Crown to know against what they had to contend.

Dr. Addams contended it was quite unnecessary. There could be no doubt in the present case upon what ground the claim was made; but, if the Court thought it necessary, another affidavit could be brought in.

Per Curiam. In the last war the principle and practice was, that in the case of enemy claimants it was always necessary to state something to show that they had a *locus standi*. The same course must be followed in the present war; but, in the present case, instead of having a further affidavit, setting forth the ground of claim, let us assume that it has been made, and proceed to the argument.

The Queen's Advocate, having stated the history of the ship's proceedings, submitted that it was clear from the ship's papers

(a) Dr. Phillimore.

1854.

THE
"PHOENIX."
Argument.

and the evidence, that she was a Russian vessel, belonging to enemies; that having been captured after the declaration of war she was clearly, by the Law of Nations, lawful prize, unless she was in any way exempted from the operation of that law. It would, perhaps, be contended that her voyage was continuous from Hartlepool to Bjorneborg; if it were so that would not protect her; but the evidence proves completion of voyage at Copenhagen. Her charter-party was for Copenhagen, and her cargo was destined for that place, and there discharged. From Copenhagen she sailed on a fresh voyage for Bjorneborg, after having received on board fifty-seven passengers. He could not conjecture on what ground, or under what Order in Council, the claim could be supported, until he had heard the counsel for the claimants, when he would reply.

Dr. Jenner followed on the same side.

Dr. Addams, contra. It does not much affect the question, whether the voyage was continuous or not; but the tenor of the evidence on the interrogatories is, that it was a continuous voyage. The master was directed to take the vessel home to Finland, where her owners resided, by way of Copenhagen. She sails from Hartlepool and arrives at Copenhagen before war was declared. She was detained there until after the declaration of war, by the ice not permitting entrance into Bjorneborg. She sailed from Copenhagen on the 10th of April, and by the true construction of the Order in Council of the 29th of March, she should have been protected in her voyage home until the 10th of May.

The true construction of that Order is the question for the consideration of the Court. That document must be taken in connection with the others issued by the same authority about the same time, and must be construed with the utmost liberality. The language of all the documents is so loose that no strict interpretation can fairly be put upon them. If this vessel is not protected by the strict letter of the Order in Council of the 29th of March, it is by its spirit. By its spirit it must be construed, otherwise this absurdity is the result — those Russian vessels which are in our ports, and therefore in our power, we are to let go; but those which are not, we are to search for, and capture as lawful prize. By the strict letter of the Order, a vessel in Plymouth on the 29th of March, and sailing subsequently would be protected, while a vessel sailing from the same port on the 28th might be captured, and brought back into the port as lawful prize on the 31st. Such an interpretation would make the Order in Council a mere trap for Russian merchant-vessels, for such a construction could never have been anticipated.

From whatever port they sailed they were entitled to protection until the 10th of May.

Dr. *Twiss* followed on the same side.

The Queen's Advocate, in reply. Liberality of construction cannot be carried to the length of considering vessels *out of* her Majesty's dominions as *in* her Majesty's dominions. The exemption specifies, "Russian merchant-vessels in any ports or places within her Majesty's dominions," and the vessel now claimed was at such time in Copenhagen, and cannot by any liberality of construction be brought within that exemption.

DR. LUSHINGTON. It is very probable that this may not be the only case under similar circumstances brought under the cognizance of this Court; but whether it is the only case or not it is my duty, as it is the first brought under consideration, to state the grounds upon which my judgment will be founded.

I will first address myself to the facts of the case. It is admitted on both sides that this is a Russian vessel; that she was lying in the port of London for the purpose of taking a cargo for Lisbon, when, in consequence of the unsettled state of affairs, her destination was changed, and she sailed in December 1853 to Hartlepool, to take in a cargo of coals; that in the middle of February she sailed from Hartlepool to Copenhagen. All these facts took place prior to the declaration of hostilities to which I must presently advert. She discharged her cargo at Copenhagen about the middle of March, sailed from Copenhagen on the 10th of April, and was captured on the 12th on her voyage to the port of Bjorneborg, in Finland.

These being the facts of the case, two questions appear to have arisen with respect to the Order in Council, to which of course reference must be made; first, whether the "Phoenix" comes fairly within the meaning of that Order, and secondly, whether the voyage in which she was engaged was a continuous voyage or not.

Now the Order for general reprisals having been issued on the 28th of March, and the declaration of war upon the day following, it is quite clear that unless something has passed under the authority of the Government to exempt any, all Russian vessels would be liable to detention on the high seas, and to condemnation in the Court of Admiralty. But it appears that her Majesty's Government have thought it right to introduce certain modifications of the belligerent rights which her Majesty is entitled to exercise. These modifications are to be found in the various Orders in Council, to which allusion has been made in argument.

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"PHENIX."
Argument.

Judgment.

The circumstances of the case.

Two questions arise out of these facts:—
1st. Does the "Phoenix" come fairly within the meaning of the Order in Council, so as to be exempted from capture?
2nd. Was the voyage from Hartlepool to Bjorneborg, *via* Copenhagen or continuous voyage or not?

War declared 29th March,—therefore the capture on the 12th of April lawful, unless

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Judgment.

any special exemption can be shown.

The different documents emanating from the Government must be construed together, so as to elucidate one another.

It is not usual to state reasons in such documents.

Documents such as Orders in Council, relaxing the severity of belligerent rights, are to be construed most liberally for those in whose favour they were made

But interpretation must be confined to the words of the document, and not travel beyond it.

Examination
of the Order in

I agree in thinking, that all these documents are to be construed fairly together — that if there be any doubt as to the interpretation to be put upon one, it must be construed with reference to others issued on the same subject, in order, if possible, to discover the true intention of the Government in issuing it; but I cannot agree with the argument, that in documents of this kind we should expect to find a statement of the reasons which actuated the Government in the modification of the belligerent rights to which it has seemed proper to resort. It is not according to the custom of former times to set forth the facts and circumstances which induced the Sovereign to adopt measures of this description. Indeed, very great inconvenience might arise from the adoption of such a course of proceeding. We must judge of the document by itself alone.

Much of the argument in the present case has turned upon that document which bears date the 29th of March last, and which immediately succeeds an Order in Council for preventing vessels clearing out for Russia, and ordering, as is customary in all wars, a general embargo or stoppage of enemies' vessels. Now, upon what principle am I to put a construction upon this document? I am perfectly free to confess that I think it to be quite clear, that whenever the Government of Great Britain or of any other country by a public document in the nature of an Order in Council releases the severity of belligerent rights, it ought to be taken in favour of the party for whom it is intended, and that a liberal construction should be put upon it. If it were necessary to confirm my opinion by authority, I could resort without difficulty to that of Lord *Stowell*. However, it is perfectly clear, that that is the true principle. When discussion arises with regard to the intention of those from whom the document emanates, we can only look for that intention to the words in which they express it. The principle being, to put upon the words the most extensive interpretation which is consistent with them, I take it for granted there must be words in the document sufficient to justify that interpretation. I am not at liberty to travel out of the document. If the words of the document are capable of two constructions, then I am clearly of opinion that the one most favourable to the belligerent party in whose favour the document is issued ought to be adopted; but the Court must bear in mind, that its province is not *jus dare*, but *jus dicere*; and I must again refer to the principle which I have often enunciated in this Court *verbis plane expressis omnino standum est*.

I must now refer to the document in question; it is an Order in Council for exempting from capture enemies' vessels under

special circumstances; it is in these words: "Her Majesty being compelled to declare war against his Imperial Majesty the Emperor of All the Russias, and being desirous to lessen as much as possible the evils thereof;"—much might be said upon the precise meaning of these words, whether it was intended to lessen the evils suffered by British subjects engaged in commerce with Russia, or by the subjects of Russia; at all events, it appears to me that it would not be correct to take the words as only operating in favour of the latter, though no doubt one part of the document is intended to confer great favour upon them—"is pleased to order that Russian merchant-vessels in any ports or places within her Majesty's dominions"—we must recollect that we are speaking of a matter over which the Queen of England is supreme; with the advice of her constitutional advisers she may make any relaxations she pleases of the rights of war against belligerents; and whatever she may declare becomes the law of these Courts, so far as relaxing belligerent rights, provided she does not go beyond them—"shall be allowed until the 10th day of May next, for loading their cargoes, and departing from such port or places."

Now, the first division I find is, that this Order applies to vessels in certain ports and places within her Majesty's dominions. Then I am to consider whether I can by any latitude of construction apply this to a vessel which, on the 29th of March, was lying at Copenhagen. The only ground upon which that could be contended for would be either that the words had no real meaning, and were perfectly superfluous, or that it might be said that having been once in her Majesty's dominions she was to be considered in the same position, with respect to the protection, as a vessel remaining there on the 29th of March. What would be the effect of either of these constructions? Take the first: it would have the effect of protecting the whole of the Russian merchant navy wherever they had sailed from all over the world at any period anterior to the 29th of March; and the argument, which was addressed to the Court, went the length of saying that I might put that construction on the words. Take the other construction, and see whether, by any latitude of interpretation, it can come within the meaning of the words. If I were to consider that a vessel which sailed from Hartlepool in February, and proceeded to Copenhagen, was included, then any Russian vessel that had taken a cargo out of Great Britain, or, rather, out of any of the dominions of her Majesty, at any time prior to the Order in Council, would be entitled to protection. I cannot possibly give this effect to the words. I

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Judgment.
Council, dated
the 29th of
March.

The Queen of England has supreme power, with the advice of her Council, to relax her belligerent rights, and so far to make law for the Prize Courts.

The Order specifies Russian vessels in her Majesty's dominions at the date of such Order, and cannot be extended to vessels which had left prior to that date.

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Judgment.

A further specification is the loading of their cargoes.

The latter part of this Order shows that the whole has reference to the trade of her Majesty's dominions.

This view is confirmed by reference to the Order of the 7th of April, respecting Russian vessels lying in or bound for ports in the East Indian or colonial possessions of her Majesty.

Not necessary to consider

confess I cannot get over the limitation of the time by reference to the words of this or of any other Order in Council.

But besides this limitation of the time of six weeks from the 29th of March, there is another, viz., the loading their cargoes. There is a limitation of six weeks for loading their cargoes, and not the least reference to a cargo taken on board in February. It goes on to say, "and that *such* Russian merchant-vessels,"—what is the meaning of "*such*"? It means Russian vessels which, having been in her Majesty's dominions on the 29th of March, had loaded their cargoes and departed prior to the 10th of May; that is the meaning of the word "*such*"—it is a word of limitation and qualification; and it is these vessels which shall be permitted to continue their voyage.

The Order in Council goes on to say: "And it is hereby further ordered by her Majesty, &c., that any Russian merchant-vessel which, prior to the date of this Order, shall have sailed from any foreign port, bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded." What is the meaning of this? It clearly has reference to trade with her Majesty's dominions. The vessel, to be entitled to protection, must have sailed from some foreign port bound for a port in her Majesty's dominions. It is there the trade is to be brought. If I were to put the construction on this Order in Council, which has been prayed, and apply it to all Russian vessels which sailed with cargoes antecedent to the 29th of March, must not the Order have been expressed in totally different words?

Then, again, with reference to the further Order, dated the 7th of April, respecting the East Indies and the colonies, it is of precisely the same character. It allows Russian vessels which may be in any of the Indian or colonial ports, at the time of the publication of the Order there, thirty days for taking their cargoes on board and departing; and it further allows Russian vessels, which had sailed from any foreign port prior to the declaration of war, bound for any port or place in any of her Majesty's Indian territories, or foreign or colonial possessions, to enter such port or place, and to discharge her cargo, and forthwith to depart without molestation.

For all these reasons, looking at the first head, the Court can have no hesitation in pronouncing this vessel liable to condemnation.

With regard to the second point, whether this was a con-

tinuous voyage or not, I do not think the Court is called upon to decide it; I shall, therefore, give no opinion upon it, but leave it unprejudiced.

I am bound to condemn this vessel, as being enemy's property, and as not being within those exceptions which her Majesty has been pleased to make.

Proctors: for the captors, *F. H. Dyke* (Queen's Proctor); for the claimants, *F. Clarkson*.

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whether the voyage was continuous or not.

Vessel condemned.

THE "AINA," *Nystrom*.

THIS was a Russian vessel captured by her Majesty's steamship "Alban," on the 21st of April, in the Cattegat, sailing under Danish colours, on a voyage from Lisbon to Elsinore.

A claim was made by Messrs. Sieveking of Sise Lane, London, as the agents and on behalf of "Carl Frederic Degener, a citizen of the Free Hanse Town of Lubeck, and Consul of his Majesty the King of the Netherlands, at Helsingfors, in Finland, the true, lawful, and sole mortgagee of one third part or share of the above-named vessel." In the affidavit of Mr. Sieveking, accompanying the claim, it was stated, *that* "by a certain instrument, bearing date the 2nd day of January 1854, Eric Nils Sundman, the lawful owner of one third part of the said ship, mortgaged his said one third part thereof to the said C. F. Degener, as a security for repayment of 7200 silver roubles, lent by him to Eric Nils Sundman as therein mentioned; *that* at the time of the capture of the said ship, as he verily believed, no part of the said mortgage debt had been paid, but *that* the whole thereof was due and outstanding and unsatisfied; *that* the said C. F. Degener was, at the time of the said capture and now is, a citizen of the Free Hanse Town of Lubeck, and *that* no person being a subject or subjects of Russia, nor their factors or agents, nor any other enemies of the Crown of Great Britain, had at the time of the said capture or now have, directly or indirectly, any right, title, or interest in the said mortgage debt, or any part thereof."

The case came on for hearing on the evidence upon the standing interrogatories and this affidavit.

The Queen's Advocate, for the captor.

The evidence leaves no doubt as to the ship being enemy's property, and no witness seems to know anything of this mortgage. There is nothing but the affidavit of Mr. Sieveking. That is a singular one. It states that the claimant is residing in the

ADMIRALTY PRIZE COURT.

June 21.

A claim for one third of the proceeds of the ship founded on a mortgage deed, on behalf of a citizen of Lubeck resident at Helsingfors, in Finland, as Consul of the King of the Netherlands, disallowed. A neutral, resident as merchant and consul in the enemy's country, loses his neutral character during such residence. Foreigners cannot set up a mortgage deed on the ship against captors, though, under certain circumstances, the lien of British merchants may be allowed.

Argument.

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THE "AINA."
Argument.

enemy's country, and does not say he is not a Russian subject. He is clearly adhering to the enemy, and, therefore, cannot sustain this claim.

But if there were no objection to the claimant, the claim could not be sustained. Captors take without reference to such lien, supposing this mortgage was perfectly regular and duly executed, of which not a syllable appears in the evidence or the ship's papers.

Dr. *Deane*, on the same side.

It appears that the claimant was residing in the enemy's country for the purposes of trade, and though born in a country now neutral, he has lost his neutral character. His being consul for the Netherlands does not protect him. In the "*Indian Chief*" (a), Lord *Stowell* said, it was a point fully established in these Courts, that the character of consul does not protect that of merchant united in the same person.

Dr. *Addams*, for the claimant. It is objected that there is no evidence of this mortgage, and that we have withheld information we might have given. That was not the practice of the Court. At the present stage we have no right to give evidence; we can only state what we can prove, if allowed further proof. We can prove the due execution of this mortgaged deed, and on that we claim one third of the proceeds of this ship. The principle adopted by the Court respecting these liens is laid down by Lord *Stowell*, in the "*Belvidere*" (b); it rejects the claim on secret liens, but admits them where the claimant has some specific security. Here the claimant is in possession of such specific security, and is entitled to the third part of this vessel.

Dr. *Twiss*, on the same side. The Court may have discouraged secret liens, but there are many cases where *bonâ fide* claims of this nature have been admitted. [*Per Curiam*. Were not all those cases where the claimants were British subjects, and the vessel had been seized in a British port? Can you show me any case at all similar to the present where the claim has been allowed?] The principle of those cases may be extended. Lord *Stowell* regarded bottomree-bonds with favour: "*Constantia Harlessen*." (c) A mortgage may be put at least on an equal footing.

The Queen's Advocate, in reply. No attempt has been made to answer the objection that the claimant does not state that he is not an enemy. He must know whether he is a Russian subject or not, and he has suppressed the information. This is no case

(a) 3 C. Rob. 27.

(b) 1 Doda. 356.

(c) Edw. 234.

for further proof. The question of the lien seems disposed of by the judgment of Lord *Stowell*, in the "*Marianna*." (a)

[Dr. *Addams*. The remarks of the Judge in that case were directed against secret liens.]

DR. LUSHINGTON. Two questions have arisen with respect to the present claim; first, as to the national character of the claimant, whether he is to be considered an enemy or a neutral; and, secondly, whether supposing him to be neutral, he would be entitled to come to this Court, and claim one third of his ship by virtue of an alleged mortgage executed prior to the declaration of hostilities.

Now, with reference to the first question, it is stated that "he is a citizen of the Free Hanse Town of Lubeck, and Consul of his Majesty the King of the Netherlands at Helsingfors, in Finland." Upon this I can put but one construction, that he is resident in Finland, and carrying on his business there. I take it to be a point beyond controversy, that where a neutral, after the commencement of war, continues to reside in the enemy's country for the purposes of trade, he is considered as adhering to the enemy, and as disqualified for claiming as a neutral altogether.

But, with regard to the claim on the mortgage, I asked whether there was any case where such a claim had been allowed to any but British merchants, and counsel were unable to furnish me with any. The case of the "*Belvidere*." (b) was of quite a different character. That was an American vessel which was seized in the river Thames under an embargo which preceded the declaration of hostilities between Great Britain and the United States. A claim was made by some British merchants for advances made by them for the use of the ship, and

(a) 6 C. Rob. 25. Lord *Stowell* says, "This ship appears to have been originally an American vessel, sold to a Spanish merchant at Buenos Ayres, and seized on a voyage to this country, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. A claim is given on behalf of the former American proprietor, in virtue of a lien, which he is said to have retained on the property for the payment of the purchase money; but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a Court of Prize. Captors are supposed to lay hands on the gross tangible property, on which there may be many just

claims outstanding between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the Court which has to decide upon the question of property to admit such considerations."

(b) 1 Dod. 356.

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THE "AINA."

Judgment.

Two questions:—
1st. The national character of the claimant?
2nd. The nature of the claim?

A neutral continuing to reside in the enemy's country during war loses neutral privileges.

There is no case where the claim of lien on behalf of aliens has been allowed against captors.

Under certain circumstances, such a claim on behalf of British merchants may be allowed.

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THE "AINA."
Judgment.

it was alleged, that the ship had been put into their hands as a security for the debt so contracted. In that case there was a bare claim without any evidence; the claim was not allowed, and it is only on certain words which fell from Lord *Stowell*, that any argument can be founded in support of the present claim. Alluding to certain cases where the claim of lien had been allowed, he says, "They had either a positive lien upon the ship, or were in possession of a bottomree-bond, or some specific security;" but it so happens that, on referring to the case, we find the distinction to which I alluded; for Lord *Stowell* there says, "It was thought by the Court and by the Government also, that it would be a harsh measure to make *British* merchants sustain the loss of money so expended." (a)

The allowance of such a claim would lead to innumerable difficulties.

The practice with regard to claims is, in the first instance, to state what can be proved, not to enter upon the proof.

But it is a very different question whether lenity should be shown to British merchants when the captured vessel has been lying in a British port, where they have had transactions in the way of business with it; and whether, as in cases of this kind, the Court should allow an alien to put in a claim to defeat the right of the captors. If I am to do it in the present case, innumerable questions would arise, and the Court might be called upon to inquire into the validity of the mortgage, and be compelled to determine that validity, not by the law of England, but by the law of the country where it was executed. I accede to the argument of Dr. *Addams*, that in the first instance, they would only state the fact of the mortgage without entering into any particulars or proof. That would be done if further proof were admitted. But having no doubt whatever in my own mind that the case fails on both grounds, viz. the national character of the claimant and the nature of the claim, I cannot admit further proof. The vessel must be condemned.

Proctors: for the captors, *The Queen's Proctor*; for the claimant, *Deacon*.

(a) 1 Dod. 358.

ADMIRALTY
PRIZE COURT.
The Court cannot restore property to an enemy master without the consent of the captors.

THE "AINA."

DR. *ADDAMS* moved the Court to decree the restoration to the master of two casks of red wine, and three smaller casks of white wine, together of the value of about 13*l.*, which he had purchased at Lisbon on his own private adventure.

DR. *LUSHINGTON*. No doubt the Court has power, and has continued to exercise it, of restoring property to neutral masters,

but I have no authority to restore to an enemy master except by consent of the captors.

The Queen's Advocate. We have no objection.

THE COURT. Well, then, it may be given up; but I wish it to be understood that I have no authority, as far as I can discover, to restore to an enemy master without consent.

Proctor for the master, *Heales*.

1854.
THE "AINA."

THE "JOHANNA EMILIE," otherwise "EMILIA,"
Ontjes.

ADMIRALTY
PRIZE COURT.
June 29. & 30.

THIS schooner was seized in the London Docks early in May last by Mr. Cox, Acting Landing Surveyor of the Customs, who had received information that, though sailing under Hanoverian colours, she was really a Russian vessel.

The master, mate, and cook were examined on the interrogatories, and a claim was given in by Theodor Schlutow, of Mincing Lane, London, who made an affidavit that he was authorized to make the claim on behalf of Georg Schwerts, of Leer, in the kingdom of Hanover, merchant and shipowner, a subject of the King of Hanover, sole owner and proprietor of the said schooner at the time of her seizure in the London Docks."

The facts of the case, as stated in the evidence, were these:—The schooner was built last year at Leer, in the kingdom of Hanover, and sailed thence on the 20th of October, entirely manned with Hanoverians. She first sailed to Riga in ballast, thence to Havre, and on the 3rd of January to Newcastle, where she took in a cargo of coals for Lisbon, where she arrived on the 16th of February; and having delivered her cargo, took in another for London. She sailed from Lisbon on the 4th of April, and arrived in the London Docks on the 1st of May. A few days afterwards she was seized. The master stated that for some reason or other which he could not set forth, the schooner, from first leaving Leer, until her arrival at Lisbon, was navigated under the Russian flag; that while at Newcastle, he received a power of attorney from Mr. Rucker, her then owner, the Hanoverian Consul General at Riga, authorizing him to sell her, in consequence of which he proceeded to Leer, and transferred her to Mr. Schwerts, the present claimant; that on completing the transfer, he returned to Newcastle, and proceeded with her to Lisbon, where he received instructions from Mr. Schwerts to give up the Russian papers

A vessel built in Hanover in 1853, sailed in ballast to Riga, with a crew of Hanoverians. She then sailed, under Russian colours, to Havre, thence to Newcastle, thence to Lisbon. There she took in a cargo, and sailed for London on the 4th of April, under Hanoverian colours. Shortly after her arrival in the London Docks she was seized by a Custom House officer. She was claimed on the ground, that while lying at Newcastle she had been, under a power of attorney given by the owner to the master, sold, and transferred to an Hanoverian. Further proof allowed. The legal consequences of destruction or spoliation of papers depend for the most part upon the circumstances of each case.

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and colours, which he did to the Russian consul; after which she sailed under Hanoverian colours and papers. The purchase money was stated to have been 8000 dollars, which were received by a notary at Leer, and remitted to Mr. Rucker.

The Queen's Advocate, and *The Admiralty Advocate*, for the Crown.

The evidence shows the vessel to have been a Russian, not an Hanoverian. The alleged transfer from Mr. Rucker to Mr. Schwerts was a sham sale, to defeat our belligerent rights. No money passed at the time of the alleged sale, and after that time the vessel sailed from Newcastle to Lisbon under Russian colours without any Hanoverian colours on board, and in the same trade as before. The "*Omnibus*." (a)

There has been a distinct spoliation of papers by the master on the outward voyage to Lisbon, at Lisbon, and on the homeward voyage from Lisbon to London. That is a sufficient ground for condemnation, or at least a bar to restitution without further proof. The "*Hunter*" (b), "*Two Brothers*" (c), "*Rising Sun*" (d), "*Polly*." (e)

Dr. *Addams* and Dr. *Twiss*, for the claimant.

The seizure of this vessel was made in violation of the Orders in Council. Revenue officers have no right whatever to seize vessels and proceed against them as prizes. This schooner was built in Hanover, belonged to an Hanoverian subject, not a Russian. The transfer was a *bonâ fide* transaction between one Hanoverian and another, previous to a declaration of war. There is no law to prevent a neutral from purchasing a ship from an enemy. As to there being no entry of the sale in the log-book, that cannot affect the sale; there is a regular bill of sale transferring the vessel according to the forms used in Hanover.

There has been no spoliation of papers to affect this ship. When it is alleged to have taken place, the master could not have known that war had been declared; it was not therefore a spoliation in the proper sense of the term. There was no ground whatever for the seizure, and the Court must therefore not only restore the vessel, but condemn the seizer in costs.

The Queen's Advocate and *Admiralty Advocate*, in reply.

It is objected that the Custom House officers, having no commission, had no right to seize this vessel; and that this Court has no jurisdiction to try such a case. But in "*La Rosine*" (f), seizure was made by an officer in the Fife Dragoons. It is common for captures to be made by non-commissioned persons.

(a) 6 C. Rob. 71.

(b) 1 Dods. 486.

(c) 1 C. Rob. 133.

(d) 2 C. Rob. 106.

(e) Ibid. 366.

(f) Ibid. 373.

The capture is equally good, but it belongs to the Queen in her office of Admiralty: "*The Rebeckah*." (a)

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DR. LUSHINGTON. I will address myself, in the first instance, to the observations which have been made on behalf of the claimant with regard to the course of proceeding which has been adopted on the present occasion; and, perhaps, I ought to take some little blame to myself for having elicited some of those observations in consequence of what then dropped from me in reference to the embargo which is placed on Russian vessels,—vessels bearing the Russian flag at the time they entered these ports. It had no reference to the case of vessels seized under other colours, but which subsequently turned out to be Russian. With regard to an enemy's property coming to any part of the kingdom, or being found there, being seizable, I confess I am astonished that a doubt could exist on the subject. I apprehend the law has been this, that it is competent for any person to take possession of such property, unless it had any protection by license, or some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it for adjudication. There are many instances in which a capture has been made in port by non-commissioned captors, and the usual form has been for the proceedings to be conducted under the authority of the Proctor for the Admiralty, and condemnation has passed to her Majesty in her office of Admiralty. If the property was on land, according to the ancient law, it was also seizable; and certainly during the American war there were not wanting instances in which such property was seized and condemned by law,—not by the authority of this Court, but of another. That rigour was afterwards relaxed. I believe no such instance has occurred from the time of the American war to the present day—no instance in which property inland was subject to search or seizure, but no doubt it would be competent to the authority of the Crown if it thought fit.

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It is perfectly legal for any of her Majesty's subjects, whether commissioned or not, to seize an enemy's ship; but it does not become the prize of the seizer.

Of late years it has not been usual in war to seize on land any property belonging to subjects of the enemy.

The Queen's Advocate. Recently, during the present war, ships on land have been seized, I believe.

THE COURT. That was under peculiar circumstances.

The Queen's Advocate. Not in this Court, but by inquisition *in rem*.

THE COURT. But that was property belonging to the Emperor of Russia, and not to a subject. The munitions of war fall under different rules. I am not aware that it has pleased her Majesty to take measures to seize property which might be lying

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The question is, should this vessel be condemned, or should further proof of property be allowed?

The circumstances of the case.

If a native of one country resides and carries on trade in another for some time, his national character is that of his domicile, not of his birth.

in a merchant's hands in the city of London or elsewhere. I believe that the proceedings which you allude to are of a different character. I cannot entertain a doubt that these proceedings have been duly instituted, and they have been sanctioned by those who advise her Majesty in her office of Admiralty, as well as by her Majesty's Advocate.

Then the only question, or rather the great question which remains for me to decide is, whether the claim for the ship ought to be admitted, whether further proof is necessary, or whether it ought to be condemned. Now, the facts of this case are somewhat peculiar. The fact of the vessel having been seized while lying in the London Docks does to some extent account for her not having the usual papers on board, because it is customary for them, while the ship is lying in port, to be in the hands of the consul acting for the state to which the ship alleges itself to belong. Therefore I am not surprised myself that no further papers have been found than those attached to the affidavit of Mr. Cox, the seizing officer. There are papers to which I will presently advert, but these are not the papers of primary importance in this case. The general features of the case are as follows: — This vessel was built in the kingdom of Hanover in 1853; her master throughout the whole period was an Hanoverian, and so were the whole of the crew, and, as appears from certain parts of his evidence, the present claimant is the individual who, to a certain extent, had the direction of her commercial transactions. The claim on the present occasion is entirely founded on her transfer, and it is ludicrous to contend that the property of the ship was not, immediately after her building, in Mr. Rucker, who was resident at Riga, because the claim is founded on the ship having been bought of Mr. Rucker; therefore, so far as the interests of these Courts are concerned, that must be taken to be an admitted fact. She was the property of Mr. Rucker, and she sailed under Russian colours from the time she was built up to the period of sailing from the port of Lisbon.

Now, Mr. Rucker is a gentleman, who, according to the evidence, is an Hanoverian subject, acting as the Hanoverian Consul, resident at Riga, a Russian port. He has been domiciled there for many years, and must, therefore, in consequence of his domicile, in all that relates to his national character, be taken to be a Russian, not an Hanoverian. There is no principle, I apprehend, so well laid down, — no principle so generally followed as this, that whatever country a gentleman may belong to, if he is resident in and carries on trade for a period of time in another country, he must be taken, for the purposes of trade, to belong to that other country, and not to his original

domicile. With regard to the possibility of there being a *locus penitentie*, that argument might have been addressed to the Court, supposing the claim had been on behalf of Mr. Rucker, but it can have no bearing when the claim is on behalf of another person.

What I have to see, therefore, is, whether there is sufficient proof of a valid transfer from the Russian owner of the ship to the present claimant, who is an Hanoverian subject. That proof may be wholly insufficient, or, it may be sufficient, coupled with other evidence, to call on the Court for the admission of further proof, or it may be so mixed up with transactions reflecting on the *bona fides* of the proceeding, that the Court may be called upon to condemn the vessel. Looking at the state of public affairs at the latter end of 1853 and the beginning of 1854, it is perfectly consistent with probability that every person possessed of a Russian vessel would be desirous of selling it, though at a considerable sacrifice, and I have no doubt that many Russian vessels have been sold, or attempted to be sold, during that period. I say, such a sale is probable, but is also suspicious;—it is suspicious for the obvious reason that a sale made under these circumstances, — particularly to a person in the situation of the present claimant, — is undoubtedly questionable, because it well known that there is a mode of carrying on trade without being the actual owner of the vessel, namely, by transferring her to a pretended purchaser. Certainly, when a transaction of this kind is done under pressure, there always exists a certain degree of suspicion that it is not *bona fide*. With regard to the legality of the sale, assuming it to be *bona fide*, it is not denied that it is competent to neutrals to purchase the property of enemies to another country, whether consisting of ships or anything else: they have a perfect right to do so, and no belligerent right can override it. The present inquiry, therefore, is limited to whether there has been a *bona fide* transfer or not.

Looking at this case on legal principles, I must consider what is the evidence which has been given on deposition, and also what is to be found in the ship's papers; both those attached to Mr. Cox's affidavit and those subsequently brought in, at the end of the depositions, by Mr. Currey, the Examiner on the present occasion. With regard to the facts of the case, the evidence of the master is by far the most important, and I must advert to that somewhat in detail. The account which, upon the third interrogatory, the master gives is, that "The schooner sailed on her voyage from Leer on the 20th of October 1853, under Russian colours," — if I under-

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Is there sufficient proof of a valid sale and transfer of this vessel?

The sale probable under the circumstances, but suspicious.

Such sale is undoubtedly legal.

The evidence as to the sale is deficient.

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stand him rightly, this is the commencement of the only voyage he undertook — "Why she did so, is a thing belonging to the owners. I never knew, or asked to know. She had no other colours then on board." In my judgment, not the least suspicion arises from this evidence, — none whatever. It was in October 1853, that these colours were hoisted, and undoubtedly Russian colours could not then have been hoisted to interfere with the rights of England and France. Russian colours might be used for the purpose of taking advantage of sailing into Russian ports, where Russian flags were entitled to enter; but, supposing that was the case, — supposing they were used for the purpose of practising fraud on Russian ports, that is a matter of which this Court can take no cognizance whatever, for there is no maxim better laid down than that the Court of Admiralty never takes any cognizance of any practices which ships may resort to to obtain advantage in other states. Then, assuming it to be true, it is consistent with probability that Russian colours were used for the purpose stated, and it does not in any degree derogate from the good faith of the present transaction. I must confess I was astonished at the argument of counsel on that point, for I cannot see how using Russian colours in October 1853, would possibly have any effect on our belligerent rights at the present time. With regard to the subsequent change of colours, the facts of the case appear to have been these: that the master, when lying in the port of Newcastle, received a letter, according to his statement, from Mr. Rucker, in which was enclosed, as stated in answer to the 11th interrogatory, a power of attorney to sell the vessel. Of course, up to this time she had sailed under Russian colours, and his account is this: "When I was in Newcastle in January last, I received a power of attorney to sell the said ship from the said Mr. Rucker, referred to in my 8th answer. This power was sent from Riga, where Mr. Rucker lives, to my house at Leer, and was sent on thence to me at Newcastle by my wife. The said Mr. Rucker also sent me a letter to Newcastle desiring me to sell the schooner to whomsoever. Mr. Rucker is the Hanoverian consul" and so on. He says, "I believe Mr. Rucker is a Hanoverian subject. I have known him personally for ten years, and he has been consul-general as aforesaid all that time, and I know he is a German. I was thunderstruck to receive the said power, for I was always under the impression, up to that time, that the schooner belonged to the said George Schwere," i. e., to the present claimant. Now, this has been open to a great deal of observation, and, at first I confess, I was myself struck with this part of his evidence; but, upon

consideration, my surprise has ceased. It appears, from another part of his evidence, that he was appointed to the command of the schooner in 1853, by Mr. Schwere, and that he corresponded with this gentleman chiefly, though occasionally with Mr. Rucker; therefore I am not at all surprised that he laboured under the impression that, though sailing under Russian colours, the property was in reality Mr. Schwere's. I may observe, that it is a matter at which no one ought to be much surprised, because it is perfectly notorious that the merchants of Great Britain have repeatedly, at various times, been owners of foreign vessels sailing under foreign flags,—a privilege of which they would be very sorry to be deprived,—a privilege which, though it may subject them to difficulty in case of war, they are entitled to exercise, except so far as the rights of war may interfere with it. He then goes on to say, "Mr. Rucker's name appeared on the Russian sea-pass,"—now he is accounting for this,— "which I then had (and of which I shall depose hereafter), but I thought that was only a pretext." He was under the impression, not an unnatural one, that it was for pretence that the name of Mr. Rucker was inserted in the sea-pass.

Then it appears, that upon receiving this power of attorney, he goes over immediately to Hanover for the purpose of acting upon it; and he says that, by virtue of the said power, he transferred the schooner to Mr. Schwere. It appears that he was there on the 22nd of January, that is the date of the sale, and he came back to Newcastle, having accomplished his voyage over with as much expedition as he could, and from thence sailed to Lisbon on the 28th. Now, with regard to the power of attorney under which he acted, no doubt it is not binding in the same manner in which such a document would be framed in England. It begins by appointing him master, he having stated that he derived his appointment before from the present claimant; it then requires him to keep an account, and to recompense himself for all the services he might perform; but the clear gist of the whole is, that it fully empowers him to sell the ship, and receive the purchase money. Accordingly, this bill of sale is executed, and it fairly states that the vessel was at that time voyaging under Russian colours, and lying in the harbour of Newcastle-on-Tyne, with all her appurtenances. That appears a fact in favour of the present claimant; there was no concealment of the circumstance,—none whatever — at the time the sale took place. The exhibition of this document, supposing it to be shown to the captors, would undoubtedly have given information with regard to the proceedings of the

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vessel herself. Now, in section 4. of the bill of sale is the following important statement: "The purchase money for the sold ship, with her appurtenances, is fixed at the sum of 8000 rix-dollars, which have already been carried into account between the contracting parties before the signing of these presents." Here I must say this is a very unsatisfactory mode of effecting a sale, though I do not mean to say it is unusual; I do not mean to say that it was not effectual, but the mode of payment by merely carrying the purchase money to an account, which of course is hidden from the view of any Court having to investigate the transaction, produces in a matter of this kind a considerable degree of doubt. The effect on my mind of this mode of paying the purchase money is not favourable to the proceeding with regard to the transfer of the ship.

The bill of sale bears date on the 23rd of January, and there has been a great deal of conflict as to the master sailing from Newcastle under Russian colours after this date; and it does appear to me to be a fact requiring explanation why, after the transfer of this vessel on the 23rd of January, Hanoverian colours were not hoisted, and the Russian colours put on one side; why the vessel should not have sailed from the port of Newcastle under Hanoverian colours, having then become Hanoverian. I do not know that I have a satisfactory account of it, except in this way, by supposing that a certain time must elapse before it was possible for the master to acquire Hanoverian colours and papers, namely, the sea-pass, &c.; and, therefore, he was compelled, for the present, to continue his Russian colours. He does continue the Russian colours till he proceeds from the port of Lisbon.

An observation was made in argument with respect to the paper No. 2., which is the account of the master respecting the payment made to the Russian consul at Newcastle. I see little in that, inasmuch as the master stated that when they give up the Russian papers, they make a payment, as well as on receiving them. I see nothing of importance in that; besides, at that time the vessel continued under Russian colours.

Now, as to the sea-pass. I presume all the Russian papers were on board at the time; but the sea-pass is a very remarkable document. It bears date the 29th of November 1853, and it is not to come into force till the 4th of February 1854, and is to last till 1855. No explanation of this is given in the evidence. Undoubtedly, so it stands. Assuming it to be as it was argued on behalf of the captor, that the application was made on the 29th of November 1853, it would be a circumstance tending very strongly to impeach the integrity of all

these proceedings, because the power of attorney is not dated till the 14th of December. But presuming this pass to have been utterly blank, and afterwards filled up—of the probability of which I say nothing—then the matter would be capable of some further explanation; for it would appear the pass was given to operate on the ship from a given time, namely, I presume, from about the time she would arrive at Aurich. It stands thus: the captain is bound to produce this sea-pass at every foreign port where a royal Hanoverian consul or vice-consul is appointed. Then it seems to be exhibited at Lisbon on the 3rd of April, and in London on the 29th of April, upon his return. It had been issued at Hanover on the 29th of November 1853, and was delivered at Aurich on the 4th of February 1854—that, I apprehend, is by the officer, whose business and duty it was to have the care of matters of that kind—to come into force at that period.

Now, there are certainly circumstances attending this part of the transaction which are not altogether satisfactory on the face of the papers. I am not aware that there are any other papers to which it is necessary to advert. Upon the vessel arriving at Lisbon, I think it is of very little importance whether the papers were laid before the consul on one day or the other. Then on the return voyage the master sailed under Hanoverian colours; I apprehend for this reason,—he sailed then, and not before, because he was not in possession of the sea-pass, and not in possession of the right to use Hanoverian colours at all. But several objections have been taken to the evidence in support of this claim. It has been said that the master is entirely discredited by various circumstances; and the fact principally relied upon is the circumstance of his having denied that there was any spoliation of papers. Now, in truth and verity, there was a spoliation of papers. I must say a word as to the spoliation of papers generally before I address myself to this fact. I do not know that there is to be found in any of Lord *Stowell's* judgments any direct definition of the word “spoliation.” I am of opinion that the mere destruction of papers is not, under all circumstances, to be considered a spoliation; I say under all circumstances, because it might be carried to a very absurd length. I apprehend it might be said, if at any time during a long voyage the master destroyed papers that had no relevancy to it, relating to a former voyage, the matter would not be put in issue. To say that was a spoliation of papers, would be going the length of saying that nothing in the nature even of a private letter was to be destroyed after the vessel had left her port. I am not, however, disposed to relax the practical effect

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“Spoliation of papers” has not been accurately defined; and the destruction of papers varies with the circumstances under which they are destroyed; amounting sometimes to what is technically called “spoliation,” sometimes not.

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of the rules laid down by Lord *Stowell*, because they are consistent with good sense, and with justice to all parties; but they must not be pressed beyond his true intention with reference to all the facts of the case, because there is not one of the cases cited to me yesterday, when I came to examine them, which I have done with a great deal of care, in which I do not find that, to form an accurate judgment of them, you must be acquainted with the whole facts of the case. To pick out a single sentence, would give no accurate idea of Lord *Stowell's* opinion on the rules which he intended to prescribe to himself in matters of that kind.

The case of
 the "Hunter"
 was peculiar
 in its circum-
 stances.

Now, the case of the "*Hunter*" (a) was a case of a very peculiar kind. There the mate was caught in the act of spoliation after the voyage was begun. Neither the master nor the supercargo were produced, but they had been allowed by mutual consent to quit the vessel and go away, so that the best evidence, either for the captor or the claimant, was wholly wanting. But notwithstanding the fact of this spoliation of papers — and a grave spoliation it was, no doubt — further proof had been allowed in that case; and the question which was there discussed was, whether *still further proof* should be allowed, the further proof being insufficient. The spoliation of papers clearly appeared on the face of the depositions, and yet further proof was allowed under these circumstances; therefore it cannot be contended that the spoliation of papers uniformly and always shuts out a right to further proof. That proposition is negatived by the facts of this case, to which I have now adverted. That was a case under peculiar circumstances; I see, upon looking at my note-book, that it was appealed, and afterwards compromised.

The "Two
 Brothers" has
 a very slight
 bearing on the
 case.

The "*Two Brothers*" (b) is another case which has been cited. That has but a very slight bearing on the question of spoliation at all; because, on looking at the case, it will be seen that Lord *Stowell* thus expresses himself: he says that he decided it on the ground that the claimant did not appear to have any interest in the question. To be sure, that was quite a sufficient ground, without resorting to what would be the effect of the spoliation of papers. Now, it is true, in that case the fact of destroying papers is commented upon by Lord *Stowell*, and he states the effect on his mind; but it does not appear how the spoliation took place, so as to form any direct guide to my judgment. It is stated that the master burnt some paper before the capture — when, how long before, or what, there is no information. But I need not rely on that case, or advert to it more,

because it is quite clear that it did not turn on the spoliation of papers, but a defect of proof on the part of the claimant.

In the "*Rising Sun*" (a) Lord *Stowell* lays down the doctrine that spoliation does not inure to condemnation; with other suspicious circumstances it shuts the door against further proof. To that doctrine I entirely assent—where there has been spoliation, in some cases we may allow further proof, in other cases which you cannot describe, if the circumstances are full of strong suspicion, then, to use his own expression, the door is shut against further proof. In that case the spoliation was strong indeed, because the papers were destroyed on the appearance of the chasing vessel.

Now, let me say a word on this, as to the time at which the papers are destroyed. I pray that my meaning may not be understood beyond the words I use. I hold time to be of great importance. If papers are destroyed when the capturing vessel is in sight, or there is a chance of capture, it is the strongest proof that these papers contain some matter which would inure to condemnation; so it is if they are destroyed at the time of capture, and if they are destroyed clandestinely after capture; but if the papers are destroyed a long time antecedently, before there is any probability that they were destroyed for fraudulent purposes, and there is no evidence that it was for fraudulent purposes, then, though there is spoliation, and though, no doubt, the inference of law is against the act during war, yet the case is of a less stringent nature.

The case of the "*Polly*" was also cited (b): that is a very important case. There it is said that the spoliation makes a case for further proof; not that the spoliation of papers is a reason why no further proof should be granted, but it makes a case for further proof.

The Queen's Advocate. It cannot be released without further proof.

THE COURT. Yes; it cannot be released without further proof.

The Queen's Advocate. Though the reason is clear.

THE COURT. That is the doctrine laid down there, and the doctrine is perfectly true. So far as appears, the spoliation in that case was at the time of capture or afterwards, but in that case the property was restored, as you see at the end of the "*Polly*"; so that spoliation, on that occasion, did not extend to inure to condemnation.

The Queen's Advocate. Upon further proof.

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The doctrine in the "*Rising Sun*" is, that spoliation does not inure to condemnation; but, with other suspicious circumstances, may shut the door against further proof.

In considering the question of spoliation of papers, the time when they were destroyed is of the greatest importance.

The doctrine derived from the "*Polly*" is, that where there has been spoliation, restitution cannot take place without further proof.

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With regard to the suppression in this case, the denial of the Master does not necessarily show him to be guilty of perjury.

The Examiner is justified in taking down answers which are not immediately within the scope of the interrogatory, it being better that the Court should subsequently expunge it than be altogether ignorant of it.

Dr. *Twiss*. Lord *Stowell* says it is impossible for the Court to relax the rule; where there has been suppression of papers there must be further proof.

THE COURT. He uses the word "suppression"; these are the words I am using.

Now, to come to the fact of the suppression of papers in this case, and see to what extent it goes. An observation was made by Dr. *Addams* which induced me immediately to send for the standing interrogatories, and the 17th is in these words: "What papers, charter-parties, bills of lading, invoices, letters, or other writings were on board the ship at the time she took her departure from the last clearing port, before she was taken as prize? Were any, and, if yea, which of them burned, torn, or thrown overboard." I apprehend Dr. *Addams* was right in his observation thus far; what may have taken place on a previous voyage does not directly come within the purport of that interrogatory. I in no degree blame the Examiner for taking down the evidence, for it is better that the Examiner should take it down, and that it should be expunged, than that it should be suppressed, and the Court know nothing about it. I apprehend, strictly speaking, that interrogatory is intended to apply to the destruction of papers after the last clearing port, the effect of which would be here that it would exclude that part of the evidence given by the mate as to the destruction of papers upon the voyage from Newcastle to Lisbon. The cook swears positively to the destruction of certain papers after the departure from Lisbon, and upon the way on the voyage home.

I must first see what is said by the mate. He states first, the papers which were destroyed on the passage from Newcastle, and which, he says, were papers obtained from Riga.

I leave that out of consideration. He states the nature of these papers, and then he goes on and says, "I also saw the captain burn some papers, I do not know what, whilst we were lying at Lisbon;" that would run very nearly, I should say, within the line, but what follows, it would be safer, if I were not to consider it as evidence, because it does not appear to relate to the same transaction.

The cook says, in answer to the 17th interrogatory, "I know nothing whatever respecting any of the ship's papers, for I never saw any of them to read them. On one occasion during our last voyage from Lisbon to London, the captain brought to me when I was in my cooking place on the deck, a handful of papers, and directed me to burn them, which I did in my fire, being alone at the time. What they were, or what were their contents, or whether they were written or printed, I cannot

say, for I did not read or look at them." Now, this is positive evidence, in my judgment, as to the destruction of some papers on this voyage; and though I am of opinion that the destruction of papers antecedent to a known declaration of war does not operate with the same force and effect that it operates during the time of war, yet, at the same time, I think that it is of very considerable importance; and the distinction I take is this: I do not think that the destruction of papers antecedent to war draws upon it the same penal consequences which it does during war, but I think it gives rise to very strong suspicion, which suspicion must be removed, or it will be fatal to the case. There are cases of destruction of papers, which in themselves draw immediate penal consequences, and call upon the Court for immediate condemnation.

The captain, on the 17th interrogatory, states, "There were on board," and so on. Then he says, "There were no papers or documents, relating to the said schooner or cargo in any way, burned, torn, thrown overboard, destroyed, altered, cancelled, concealed, or attempted to be concealed, either during her last or previous voyage, or at any time whatever."

Now, I conceive that with regard to the fact, I must rely upon the evidence of the cook, and that there were papers destroyed; but whether it follows from the fact being so, that this captain has wilfully perjured himself, is another and a very different consideration, for we know not what the nature of these papers was; and the answer is in these words: "No papers or documents relating to the said schooner or cargo were in any way burned, torn, thrown overboard, or destroyed." It may be, —for it is a conjecture which I will not much rely upon,—it may be, that the papers which were so destroyed were papers which had no reference to the schooner or cargo at all, and so far the captain may be relieved from the charge of having sworn falsely; and yet at the same time the Court must deal with the fact as a fact. With regard to its operation in this case, I am not under the necessity, from any consequences that will follow, of going the length of saying that the Master has been wilfully perjured.

Then this case, in my judgment, stands thus: there has been what the law terms the spoliation of papers, and in addition to that, I am not satisfied on two points, — I am not satisfied as to the payment for the ship, and I am not satisfied exactly as to the manner in which the sea-pass was obtained. It appears to me, under these circumstances, that it is a case for further proof. I do not think the spoliation of these papers connected with circumstances of such grave suspicion as would justify me

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Judgment.

The destruction of papers antecedent to war is not visited with the same penal consequences as during war, though it gives rise to suspicion.

Notwithstanding the denial of the captain, it is clear, from the evidence of the cook, that papers were destroyed, though, perchance, these papers may have had no reference to the schooner.

In this case there has been a spoliation of papers; and the circumstances of the sale and the sea-pass are not satisfactory. It is a case for further proof.

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EMILIA."*Judgment.*

It is very unusual to open the proof to the captors by directing plea and proof.

Stringent proof of the *bond fide* nature of this transaction will be required.

in condemnation. I think the party is entitled to the benefit of further proof; I shall, therefore, admit further proof.

Her Majesty's Advocate asked if I would direct evidence to be taken by plea and proof, and open the case of the captors. That is most unusual; so unusual, that in the course of my recollection I hardly remember its being done. I would rather refer to the memory of the learned Advocate for the Admiralty, and ask if he remembers that there were cases by plea and proof open to the captors?

Dr. Phillimore. No, Sir.

THE COURT. I cannot charge my memory with more than one or two. The effect of opening the case to further proof on the part of the claimants is not to open it to the captors. That is the case of the "*Magnus*." (a) All I shall do is, to require further proof, and to state of what that must, independently of other things, consist. I must be satisfied that the sum given for the vessel was an adequate amount under all the circumstances; I must be satisfied that that money was *bond fide* paid; I must have all the correspondence produced which passed between the master and the gentleman resident at Riga; and I must have evidence from the claimant himself of all the facts and circumstances within his knowledge. With less than that the Court will not feel itself satisfied, and at liberty to restore the ship.

The Queen's Advocate. We are not to bring in any further proof.

THE COURT. No, I follow the course of Lord Stowell.

The Queen's Advocate. I am instructed that we have it.

Proctors: for the Crown, the *Admiralty Proctor*; for the claimant, *Rothery*.

(a) 1 C. Rob. 31. where Lord Stowell observes, "Plea and proof is an awakening thing; it admonishes the parties of the difficulties of their situation, and calls for all the proof that their case can supply." In the "*Adriana*" (1 C. Rob. 313.) on farther proof being brought in, it was attempted to introduce affidavits on the part of the captors to contradict it, on a suggestion that farther proof opened the case to both parties; on which Lord Stowell said, "With re-

spect to *plea and proof*, this is true; but I do not know that in proof by affidavits, this Court or the Lords of Appeal have ever laid down such a rule. I understand the rule to be, that further proof by affidavits to be exhibited on the part of the captor is only admissible under the special direction of the Court. It is not to be exercised except on special grounds, and only with the leave of the Court."

THE "IDA," *Steen.*

1854.

ADMIRALTY
PRIZE COURT.

June 29.

THIS vessel, a brig of 174 tons burthen, under Russian colours, sailed from Rio de Janeiro on the 15th of January 1854, with a cargo of 2850 bags of coffee, bound to Helsingfors, in Finland, but on her voyage put into Elsinore, whence she sailed on the 11th of April. On the 17th she was captured off Dagerort, in the Gulf of Finland, by her Majesty's ship "Gorgon."

The master and cook were examined in preparatory on the standing interrogatories; and a claim was given in by Mr. Henry Sharpe, of Broad Street Buildings, London, merchant, on behalf of Messrs. Behrens and Sons, of Hamburg, of 2650 bags of coffee, laden on board this ship.

He made oath *that* he was duly authorized to make the claim for them, "the consignees, and as such the true and lawful owners and proprietors" of the said bags of coffee. And he further made oath *that* "he is informed, and believes, that the said bags of coffee were so shipped in the month of January last past, at Rio de Janeiro, and consigned to the said Messrs. L. Behrens and Sons, on the credit of advances made by them, and by means of their acceptances, to the amount of marks banco 102431.12, for the securing of the payment of which advances bills of lading of the said 2650 bags of coffee, whereof the exhibit hereto annexed, marked A., is a counterpart, were made to them or their assigns; and *that* the said advances have not been repaid to the said Messrs. Behrens, but that the said consignment remains their only security. *That* until the said Messrs. Behrens shall be repaid, or otherwise indemnified for the said advances, neither the Emperor of Russia, nor any person being a subject of, or inhabiting within any of the dominions or territories of the Emperor of Russia, hath, directly or indirectly, any right, title to, or interest in the said goods."

Annexed to the affidavit and claim was a bill of lading for 2650 bags of coffee, stated to be shipped by G. and W. Heyman, on board this vessel, and bound to Elsinore, for orders, to be delivered at such port of destination unto Messrs. Behrens and Sons, of Hamburg, or to their assigns, paying freight for the same as per charter-party, dated Rio de Janeiro, 14th of December 1853. the bill of lading being dated 4th of January 1854.

At the hearing a further affidavit of Mr. Sharpe was tendered and allowed by the *Queen's Advocate*, to be received as evidence. He made oath *that* since filing the claim, Messrs. Behrens had

The claim of a neutral merchant for 2650 bags of coffee consigned to them on the credit of advances made by them, disallowed.

The claim is that of lien, which cannot be upheld against captors. Further proof cannot be allowed when there has been an attempt to deceive the Court by simulated papers.

Statement.

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transmitted to him three original letters, in the German language, marked A., B., and C., and six bills of lading, inclosed in the said letter, marked B.; *that* the said letters and enclosures were received by Messrs. Behrens, in due course of post, from Messrs. G. and W. Heyman, of Rio de Janeiro, merchants, the shippers of 2650 bags of coffee aforesaid, and are (save the bill of lading, No. 6.) true and genuine, and in no manner false or colourable. *That* the said bill of lading, No. 6., is, as mentioned in the said letter marked B., a colourable bill of lading, but *that* the deponent, at the time of giving in the claim aforesaid, had no knowledge of the same, or the counterpart annexed by him to the said claim, being other than a true and genuine document, for the deponent at such time was not informed of, nor in possession of any other bill or bills of lading of a different term; and he verily believes that the bill of lading annexed to his said claim was sent to him for the mere purpose of specifying the property to be claimed. And he further made oath, *that* the hereunto annexed bills of lading, marked 1, 2, 3, 4, and 5., transmitted to the said Messrs. Behrens as aforesaid, are indorsed according to the custom of merchants, and have the effect, until indorsed over by the aforesaid Messrs. Behrens, of constituting them, on their order, the lawful consignees of the several parcels of goods in the said bills of lading mentioned; and *that* the said bills of lading are still held by the said Messrs. Behrens, as security for the advances made by them in respect of the said cargo, the whole of which advances is still due and owing to them save a very small sum, &c.

The contents of these exhibits are fully set forth in the judgment.

Argument.

The Queen's Advocate, for the captors.

This is a claim for a portion of the cargo. It seems to be a claim of lien for advances for this coffee. The whole transaction is a disgraceful fraud; but, if not, the Court would disregard such lien. In the case "*Aina*" (a) the Court held that a mortgage could not be sustained against captors. He should ask the Court to condemn the claimants in the costs for their fraud. An affidavit has been brought in this morning on behalf of Messrs. Behrens, with certain letters and documents annexed. From these it appears that by desire of the captain simulated papers were put on board this vessel. There has been clearly an attempt to impose upon the Court, and to defeat our belligerent rights. The legal consequence is condemnation, without the privilege of further proof: *Oswell v. Vigne* (b), the "*Eenrom*." (c)

(a) *Anté*, p. 313.

(b) 15 East, 75.

(c) 2 C. Rob. 15.

It cannot be said that Messrs. Behrens are not responsible for the fraud. They are bound by the acts of their agents: the "*Ecnrom*" (a), the "*Calypso*." (b) The present case is quite analogous; the Messrs. Heyman were the agents of the claimant, who must be bound by their acts. In such a case the Court must condemn the claimant in costs.

Dr. *R. Phillimore*, on the same side.

Two questions arise respecting this cargo: 1st. The indorsement of the bills of lading; 2nd. The fraud respecting the papers. With regard to the first question, it is, in fact, a claim of lien, of which the Court will not take cognizance. This lien, too, would be revocable: and, therefore, least favourable. Besides, the indorsement is not an indorsement over to Messrs. Behrens, for whom the claim is made. As to the second question, it is a direct instance of fraud, when compared with the evidence of the captain that no simulated papers were on board.

Dr. *Deane*, for the claimant.

This is not a case of lien, but of ownership. Certain Finlanders sent a ship to Brazil for coffee, but, having no credit there, the coffee was shipped on account of Behrens and Company, neutrals, residing at Hamburgh. On B. & Co. the shippers drew bills, and to them, by the bills of lading, consigned the property. B. & Co. are the consignees in Europe. The bills of lading found on board the ship, and annexed to the ship's papers, are not indorsed, and the master could not pass the property described in them; but the bills of lading sent to B. & Co. are indorsed, and thereby they become entitled as owners to the property. This is the true meaning and effect of the indorsed bills of lading: *Smith's Mercantile Law*. (c) Consequently the ultimate loss, if the property be condemned, will fall on B. & Co.; and the ultimate loss is the true test of ownership in the Court of Prize, according to Lord *Stowell*, in the "*Packet de Bilboa*." (d)

It is said there was a fraudulent intention on the part of Messrs. Heyman and Company, the consignors in Brazil, to furnish the master with double sets of papers, the one true and the other colourable: the true, the charter-party, as well as bills of lading, in the names of several Finlanders; the simulated, or colourable, in the names of B. & Co. But there is no evidence of this, and the expression in the letter of Messrs. Heyman does not bear the argument out to that extent. At all events, it must have been a mere intention, never carried into effect; for only one set of papers in the name of B. & Co. were found on

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(a) 2 C. Rob. 8.

(b) *Ibid.* 160.

(c) 3rd edit. p. 272.

(d) 2 C. Rob. 135.

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board, and there is no charge against the master of spoliation of papers. There is no case of condemnation on the ground of an intention to sail under false papers. That would be carrying the case of *Oswell v. Vigne* (a) to an extravagant length.

The Helsingfors charter-party will be brought in as soon as it can be procured, if the Court will allow further proof, to which the neutral owners of this cargo are, it is submitted, entitled. The property was made over to B. & Co. by the indorsed bills of lading; it remains in them until such time as they are paid the amount advanced. As to the alleged fraud, they must have been ignorant of that; or, if informed of it, they had no time to countermand the orders.

Dr. Twiss, on the same side.

There is one question only, viz., in whom is the property? It is not in any way a question of simulated papers. It must be borne in mind that it was a neutral shipper, not an enemy shipper. The bills of lading on board, not being indorsed, convey no property: *Abbot on Shipping* (b) In this case the property remains in the neutral shipper. [*The Queen's Advocate*. There is no claim on his behalf; the claim is for the alleged consignee.] As to the indorsement, cases abound at Common Law; and the law of the Prize Court as to ownership is the same. [*Per Curiam*. If you can establish that the Common Law and the law of the Prize Court as to property or ownership are identical, you will prove wonders. If this were in the time of peace there would be no doubt whatever that the bill of lading indorsed by the consignors to the consignee would vest the property, but in the time of war the law is very different.] Mr. Justice Story seems to speak of the Law being the same in these Courts as at Common Law, in the "*San Jose Indiano*" and *Cargo* (c); and Lord Stowell states the principle of effectual transfer of property in the "*Cousine Marianne*. (d)

There is no ground for refusing the claimant the privilege of farther proof. There was no fraudulent intention with regard to the ship's papers; besides, the whole of those circumstances were antecedent to the declaration of war.

The Queen's Advocate, in reply.

The principle is clearly laid down in the "*Jan Frederick* (e), that transactions in contemplation of war are judged by the same rules as during actual hostilities. These papers were simulated in the immediate contemplation of war, and for the express purpose of defeating the rights of one of the belligerents. The

(a) 15 East, 75.

(b) 7th edit. p. 330.

(c) 2 Gallison (Amcr.), 225.

(d) Edwards, 347.

(e) 5 C. Rob. 140.

property would be, therefore, liable to condemnation. But it is not a question of ownership, but one of lien. These bills of lading were intended merely as securities for advances. The claim of lien will not avail in this Court.

Dr. R. Phillimore. In the case of the "*San Jose Indiano*," whatever may appear to be the opinions of Mr. Justice *Story*, they are founded entirely on English cases to which he refers.

DR. LUSHINGTON. There are three courses open to the Court on the present occasion, either to condemn the property, to restore it, or to direct farther proof. The course which the Court will adopt must depend on a consideration of the facts of the case, and the law applicable to them.

In the first instance, I look to what is found on board the ship, and to the examinations which have taken place upon the standing interrogatories. It is the cardinal rule of this Court that, *prima facie*, the evidence upon which the Court must form its judgment is the ship's papers, and the evidence of the master. It is very easy to set forth the contents of the examination of the master.

It appears that this was a Russian ship, and that she sailed under a charter-party from Finland to Rio de Janeiro; that there was to be purchased a cargo of coffee, which was to be brought back, and delivered in Finland, on account and at the risk of Finnish merchants. That is his representation. As far as he is concerned, he has no knowledge of the property now claimed belonging to neutrals; he believes it all to be Finnish property.

With regard to the papers found on board, there is neither a Finnish charter-party, nor any other—a circumstance which appears to me a little surprising. But there are certain bills of lading to which it is necessary to advert. There are six of them, but it will be necessary to consider one only; it is as follows: "Shipped by G. and W. Heyman, in the ship '*Ida*,' bound to *Elsinore* for orders;" then they state the quantity of coffee, the marks and numbers, to be delivered at the port of destination unto order or to assigns; nothing more being said, except that the freight is to be paid as per charter-party, which does not appear. This bill of lading is signed by the master, and I find in the margin the following words: "To be cleared at *Elsinore*, at Messrs. A. Geadman and Gloerfeldt." Now, the master, I apprehend, could have hardly had any alternative, but to have delivered these goods according to the bill of lading—to some order. What that order was intended to be is left in perfect obscurity. There is no indorsement on this bill of lading, so there is no information given to the master how

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The established rule of the Court is in the first instance to look to the ship's papers and the evidence of the master.

The circumstances of the case.

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to act when he arrived at Elsinore. This being the state of things, there is no evidence whatever of any portion of the cargo belonging to a neutral.

I now come to the claim preferred for the purpose of considering whether the parties are entitled to immediate restitution, or to give in further proof.

The original claim is given in by Mr. Sharpe, a merchant of this town, who states that he is duly authorized to make the present claim on behalf of Behrens and Sons, who are neutral merchants; and he states them to be the consignees, and, as such, the true and lawful owners and proprietors of 2650 bags of coffee. Then he goes on to state, that they were shipped in the month of January last, and consigned to Behrens and Company, on the credit of advances made by them.

This appears to be a very clear statement with respect to this claim, which is founded on two things,—on Behrens and Company being the consignees, and on the cargo having been purchased on the credit of advances made by them. He then states that the bills of lading were made for securing the payment of such advances, and the advances have not been repaid. He further says, that he verily believes that until Behrens and Company should be repaid, or otherwise indemnified for the advances, no subject of the Emperor of Russia is entitled to the property.

The bill of lading was annexed to the original claim, and is in these words:—"Shipped in good order, and well conditioned," and so on; it then states that the master was bound to Elsinore for orders—not bound, as is stated in the other bills of lading, to Helsingfors, but to Elsinore, for orders. There is a difference with regard to the destination. In some cases a difference of destination has been held to be of great importance; whether it is so in the present case we shall see when we have further examined it. It also states that the bags of coffee are to be delivered to Behrens and Co., of Hamburg, or to their assigns, he or they paying freight for the said goods, as per charter-party, dated Rio de Janeiro, 14th of December 1853, but which charter-party is not forthcoming. This bill of lading is signed by A. G. Steen.

On these papers the Court could certainly not have granted the claim: it could only have been asked to allow further proof; and whether it would have complied or not would have depended on the whole facts of the case, and whether there was any attempt to deceive the Court by the manufacture of papers which were not of a true and genuine character. But Mr. Sharpe, on behalf of Behrens and Co., has offered an affidavit, with sundry documents annexed: and her *Majesty's Advocate*,

The claim is founded on two things—on Messrs. Behrens being the consignees of the cargo, and on the cargo having been purchased on the credit of advances made by them.

The papers are not sufficient to support the claim without further proof.

Further proof can never be allowed when there has been an attempt to deceive the Court by the manufacture of papers,

on behalf of the Crown, has assented to their introduction as evidence. I may, therefore, address myself at once to these documents.

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Mr. *Sharpe* states, that since he made this claim, Messrs. Behrens have transmitted to him three original letters in the German language, and six bills of lading. He states that these letters were received by them from the shippers of the coffee, and are, save the bill of lading No. 6., true and genuine, and in no manner false or colourable. With regard to No. 6. he says: "The said bill of lading, No. 6., is, as mentioned in the said letter marked B., a colourable bill of lading."

The question will be, Colourable for what purpose? because there are circumstances in which a colourable bill of lading might be innocent, and circumstances in which it might draw after it legal consequences. Mr. *Sharpe* says, that at the time of giving in the claim he had no knowledge of the same, or the counterpart annexed to the same, being other than a true and genuine document. He says: "The five bills of lading are indorsed according to the custom of merchants, and have the effect, until indorsed over by Behrens and Company, of constituting them or their order the lawful consignees of the several parcels of goods." Upon that I apprehend there can be no dispute. Then he says the bills of lading are still held by Behrens and Company, as security for the advances made by them in respect of the cargo, the whole of which are still due, save a very small sum. They appear to be all indorsed by G. and W. Heyman, except the last, for the genuineness of which he does not vouch.

Under certain circumstances a colourable bill of lading might be innocent.

I must now direct my attention to the three letters referred to, which certainly give the Court a considerable insight into the nature of these transactions. The first bears date the 14th of December 1853, and therein the Messrs. Heyman acknowledge themselves in receipt of letters of a certain date, and say they observe thereby the confirmation of the credit for sundry shipments to Finland by sundry ships, of which the "Ida" is one. Now, from this, we get at one fact, viz., that Behrens and Company had given them credit of themselves, and they confirmed that credit for the purpose of making that shipment by the "Ida." They say: "We request you to effect a provisional insurance." This insurance, which is not undeserving of consideration, is to be made on account of these persons, who are represented by the master to be the real owners of the property. At the end of this letter the following words are added: "By the desire of the captain we shall give to the 'Ida' double sets of papers." The captain, in his evidence, has not

The letters annexed give considerable insight into the transactions.

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It is a rule of the Court, that where there are contradictory papers, the *onus probandi* lies on the claimant to show that belligerent rights are not thereby affected.

mentioned that fact at all; he says he knows the papers are all true and genuine; therefore, either this letter, or the evidence of the captain, is false. If the captain's is false we all know the consequences, and there is no reason to suppose that Messrs. Heyman would assert a matter of this kind unless it were true. They go on to say:—"That is to say, bill of lading and manifest, the original whereof, filled up to orders for Helsinki; on the other hand, the (simulated) duplicate relating to the before-mentioned coffee, is made out in your names to Elsinore for orders." Now, that simulated bill of lading was certainly framed for some purpose or other by desire of the master. It is a well-known rule of this Court that where there are contradictory papers the burden of proof lies on the claimant to show that the contradiction is not inconsistent with the rights of a belligerent power; and, I must say, I have not heard any satisfactory explanation of how or why these papers were framed, except it was for the purpose of deceiving those who might have to determine whether it was an enemy's property or not. The second letter seems a mere duplicate of the first. In the third, marked C., they say: "Enclosed, we now have the satisfaction to hand you letter of advice, invoice, and bill of lading for 2650 sacks coffee, per Russian brig 'Ida,' &c." This invoice, of course, the Court has not; but the bill of lading, I apprehend, can be no other than that now brought in by Mr. Sharpe. They then go on to say: "Agreeably to the credit opened for us with you, and confirmed by you, we have now taken the liberty to draw upon you for the account of the above-named friends;"—so that bills of exchange have been drawn, and placed to the debit account of the Russian merchants. Then we find these words: "We furthermore delivered to him," i. e. the captain, "a charter-party, which was made out for her *pro formâ*; and as he, by this proceeding, has no papers on board which would compromise the cargo, consequently we trust that, in case of a war, it will be an easy matter for you to reclaim the cargo." This, of course, means, that, by their putting papers on board which do not say whose property the cargo is, in case of a war it will be no proof that the cargo belongs to a Finnish subject.

In claims as against captors in the Prize Court, an equitable as well as legal title to the property must be established.

These being the facts of the case, I will now address myself to some of the law which has been quoted as applicable to them. The claim, I have said, is founded on two grounds: First, on Messrs. Behrens and Company being the consignees of the cargo; and, secondly, upon their having a lien on the property. It has been contended by counsel that the property is in Behrens and Company by virtue of the indorsement of the bills

of lading; and cases from Common Law have been cited in support of this. I believe that, under some circumstances, that would be the case. They would have a legal title to the property; but I have considerable doubt whether it is not the law of this Court that the claimant must show that he has not only a legal, but an equitable title. If a mere legal title would justify the Court in restoring property the consequences would be most alarming; for nothing would be more easy than to cover enemies' property from one end of the kingdom to the other. I strongly object to the doctrine that if a legal title be shown this Court is bound to restore; for I hold that an equitable title is also necessary to support a claim in this Court. With reference to the case (a) which was cited from the *American Reports*, it does not appear to me that the remarks of Mr. Justice Story have any applicability to the present case, or to the law which I am bound to administer. It appears that, in that case, an order had been given for certain goods to Messrs. Dyson and Company, merchants, in England, an enemy country, by Mr. J. Lizam, of —, in Brazil; that they executed the order, but, not being willing altogether to trust Mr. Lizam, consigned the goods to Messrs. Dyson and Finney, of Rio Janeiro,— a commercial house composed of the same partners, but trading in a neutral country. In fact, the shippers in England consigned the goods to themselves in Rio; and the question being, whether, *in transitu*, the property was in Mr. Lizam or not, it was held that it was still in Messrs. Dyson, the shippers, who were also the consignees.

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The cases cited in contradiction of this doctrine are not applicable.

To the remarks of the learned Judge I fully subscribe; but I do not see their applicability to the present case.

It would, perhaps, be as well to notice, as I go on, the case of the "*Cousine Marianne*" (b), of which a sentence was cited. That was a question whether certain goods, which had been imported into England under a license, in which the words "to whomsoever the property may appear to belong" were omitted, and which were shipped by enemy merchants, had become the property of the British consignee, or whether they still remained in the enemy shipper. Lord Stowell there said: "It is a settled principle in this Court that in order to constitute an effectual transfer of the property there must be either an order for the goods or an acceptance of them by the consignee prior to the capture." In construing Lord Stowell's words we must always be careful to remember the facts of the case, for it is impossible to arrive at his opinion from an isolated sentence. He goes on

(a) *The "San Jose Indiano" and Cargo*, 2 Gallison, 267.

(b) Edwards, 346.

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to say: "If the capture takes place where no order has been given, and before the goods have been accepted, they must be considered the property of the persons who have so consigned them." Who can possibly doubt that? If no order have been given, it would be contrary to common sense to say that a man should be bound to take and to pay for that which he had neither ordered nor subsequently accepted. He then says: "In this case, therefore, the Court has called for evidence to show whether any order had been given by the British merchants, or any act done by them in the nature of an acceptance before the capture. It is not pretended by the claimants that any specific order was given for these goods, and so on." So that the circumstances of that case were very different from the present; and if it was at all applicable it would tend to show that the property in the present case was in the shipper, for whom no claim whatever has been made.

It is the established law of the Prize Court that no lien on a ship can be recognized.

There was a case cited the other day which appears to me to have much more bearing on the present question. I allude to the "*Marianna*." (a) In that case the vessel had been sold at Buenos Ayres, by an American, to a Spanish merchant; the purchase money, however, had not been paid, but was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this vessel for sale. The vessel was seized on her voyage to this country, documented as belonging to a Spanish merchant, and a claim was given on behalf of the former American proprietor, in virtue of the lien which he professed to have retained on the property for the payment of the purchase money. That case more closely resembled, in fact it is a much stronger case than, the present; it was a claim much more in the nature of a lien: but what does Lord *Stowell* say? does he admit this to be a claim which must be upheld? No; he says: "Such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a Court of Prize. Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties which can have no operation as to them." Yet a stronger case of lien could scarcely exist. Further on he says: "Then, as to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an

understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned ; otherwise, though the security may avail, *pro tanto*, it cannot be held to work any change in the property." It is not pretended, in the present case, that any such risk fell on Messrs. Behrens and Company. They may have held the bills of lading as a security ; but, if I wanted authority, I have that of Lord *Stowell* for saying that is not sufficient to convert the property so as to defeat the right of a captor.

1854.
THE "IDA."
Judgment.

But, wholly independent of authority, it is an established principle of this Court that no lien, however honest, affords sufficient ground for restitution. It was asserted, to its fullest extent, in the "*Tobago*" (a), than which a harder case can scarcely be conceived. A British merchant had lent money to the master of a French vessel, on a bottomree-bond, previous to hostilities, but Lord *Stowell* refused to allow the claim as against the captors, and said there was no instance in which the Court had recognized bonds of this kind as titles of property ; and that they were not entitled to be recognized as such in the Prize Courts.

Such is the law ; but, looking at the facts of the present case, can I doubt where the property lies ? I am clearly of opinion that the property belongs to an enemy, subject to Messrs. Behrens' charge.

In the present case the property vested in the enemy.

The property was ordered from Finland, by persons whose names are set forth by the master, and Messrs. Heyman would not have given effect to those orders had it not been for the intervention of Messrs. Behrens and Company ; the consignors were paid for the property, which became wholly divested ; and the consignees were to indemnify themselves for the advances they had made. There is no case on record, that I am aware of, in which, when a lien existed even prior to the commencement of a war, the Court thought itself justified, on account of that lien, in making restitution. I cannot hold that the present claim stands in a more favourable light.

There is another point of law to which I must now refer. It is not possible to doubt for a single moment that there was an intention in this case, by means of colourable bills of lading and of this non-apparent charter-party, to deceive and defraud this country of its belligerent rights. Human ingenuity can discover no other reason for such a proceeding than to cover enemy's property as neutral. But, it is said, that Behrens and

Colourable papers having been used for fraudulent purposes, the claimant is bound by the act of his agent, and is barred of further proof.

1854.

THE "IDA"
Judgment.

Company cannot be affected by this, because it was not done under their authority. It appears, however, to have been the act of the master, who must be responsible, and the act of their own agents, Messrs. Heyman.

Looking, then, at the whole of the case, I entertain no doubt that I must condemn the property, because the claim, which is simply that of lien, is in no degree strengthened by the fact of Behrens and Company being consignees. I cannot see that further proof would alter the nature of this claim; besides, it is contrary to the rule of this Court to allow any further proof, where there has been an attempt to deceive the Court by the manufacture of false papers. I have been pressed by the *Queen's Advocate* to condemn the claimant in the present case in costs, but to that I cannot accede, as it has not been usual to condemn neutrals in costs, unless under very peculiar circumstances.

Proctors: for the captors, the *Queen's Proctor*; for the claimant, *Poynter*.

It is not usual, except under very peculiar circumstances, to condemn a neutral in costs.

ADMIRALTY
PRIZE COURT.

July 21.

The claim of an *alien enemy* directed to be amended, as not stating any matter to give him a *persona standi in judicio*.

Argument.

THE "TROLJA."

THIS was a case of claim by an *alien enemy*.

The Queen's Advocate, for the captors, again took the objection taken in the "*Phoenix*" (a), that the affidavit accompanying the claim does not state any matter which could give the enemy a *persona standi in judicio*. He thought that, after what fell from the Court in the case of the "*Phoenix*," he should not have been compelled to raise the objection again. But he would not recede from the rights of the Crown, and he had a right to know, before the case came on for hearing, upon what ground the enemy claimed the restoration of the captured property. An enemy has no right to claim under his affidavit, *simpliciter* as an enemy, and then, at the hearing, to state for the first time, by his counsel, the grounds of his claim. He must show some peculiar grounds to give him the privilege of suing in the Court of Justice. In the case of "*The Hoop*," Lord *Stowell* says (b): "Our Courts of the Law of Nations are so far *British Courts* that no man can sue therein who is a subject of the enemy, unless under particular circumstances that, *pro hac vice*, discharge him from the character of an enemy — such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the king's peace *pro hac vice*." So,

(a) *Anté*, p. 307.

(b) 1 C. Rob. 201.; *Story's Prize Practice*, by Dr. Pratt, p. 21.

if the claimant in the present case claims under any of her Majesty's Orders in Council, he is bound to allege that, before he can be heard in support of his claim.

The Admiralty Advocate. There are several cases similar to the present, and it was thought desirable to stop it at once, and bring the present practice to accord with that of former cases. The Court is not asked to reject the claim, but to compel the claimant to amend it: "*The Vrouw.*" (a)

Dr. *Addams, contra.* He thought that, after what transpired in the case of the "*Phoenix*," this objection would not have been raised. There could not possibly be any doubt that the claim was made under the Orders in Council; it could not be on any other ground. This claim was made, and the affidavit sworn, a fortnight before the hearing of the "*Phoenix*," when the direction of the Court respecting such claims was given; it was, therefore, not thought necessary to have the claim amended. In fact, communications to that effect have taken place between the *Admiralty Proctor* and the Proctor for the claimant.

DR. LUSHINGTON. I entertain no doubt as to the correct practice in such cases; it is, that when an enemy claims he must show a *persona standi in judicio*, the law being that an alien enemy is not entitled in any way to sue in this or any other Court. It is clear that, with regard to these claims, an error has been committed. On a former occasion, I expressed my opinion upon the subject, but, being desirous to throw no impediment in the way of any claimant, I directed the case to proceed without having the error rectified by the amendment of the claim. I intended what I then said, however, as a warning, and certainly did not expect to find the warning had been disregarded; and if I saw that in the present case the claim had been given, and the affidavit sworn, subsequent to the period when I made those observations, I should certainly have rejected the claim altogether; but as I find the claim was made previous to that time, I will give the party a *locus penitentiae*, and allow him to amend his claim. The hearing must stand over till that is done; and if the party claims under the Orders in Council, I shall expect him to state the specific order by which he claims to be protected. I direct the claim to be amended. (b)

Proctors: for the captors, *The Admiralty Proctor*; for the claimant, *Deacon*.

(a) 1 C. Rob. 169.

(b) In a subsequent part of the day, the counsel for the claimant having stated to the Court that the

claim would not be amended, sentence of condemnation was passed; but the same day several other cases were deferred for the same purpose.

1854.

ADMIRALTY
PRIZE COURT.

July 21.

When the evidence of the master as to the ownership of the property claimed is deficient, it cannot be restored without further proof.

*Statement.*THE "FIDENTIA," *Serlachius*.

THE Russian barque "Fidentia," sailed from Cadiz on the 9th of March 1854, bound for Loviso, with a cargo of salt, wine, corks, and olive oil, and was captured by her Majesty's ship of war "Tribune," upon the 9th of April.

A claim given for the ship by an enemy was directed to be amended, as in the previous case, but was afterwards abandoned.

A claim for a portion of the cargo, specified in two bills of lading, was made by Elias Charles Unonius, of Winchester Street, London, on behalf of "John Duncan Shaw, of the City of Cadiz, a British subject, the sole owner and proprietor thereof."

These bills of lading, which were annexed to the affidavit of the claimant, were dated March the 7th 1854, and stated the goods to have been "shipped by John Duncan Shaw, to be delivered to Elias Unonius & Son, Esqs., or to assigns; freight for the same goods paid in Cadiz." On each of these bills, and bearing the same date was a certificate of the British consul at Cadiz, to the effect that, "Enrique Campagne, *pro* John Duncan Shaw, a British merchant established in that city, personally appeared, and voluntarily declared upon oath that the goods described in the bill of lading were *bonâ fide* his own property, and had been shipped on that day by his sole account and risk to the consignment of El. Unonius & Son, Esqs."

The master, mate, and cook were examined on the interrogatories.

Argument.

The Queen's Advocate and *Dr. Robinson*, for the captors. The claim for the ship must be amended. That for the cargo stands on a different footing. But there is a deficiency in the affidavit accompanying that claim sufficient to induce the Court to reject it. The agent does not swear to his belief that the property, if restored, will belong to his principal. The principal question will be, to whom will the property belong if restored. It might belong to him when it left Cadiz, but still might not belong to him if returned. That is the only principle on which it can be claimed in this Court. The affidavit is carefully drawn, yet that important point is omitted. The agent might easily have communicated with his principal at Cadiz. The omission, therefore, is a very suspicious circumstance.

The claim itself, as to the property of the cargo, fails on the evidence and the ship's papers. The master, on the eighth interrogatory, says: "Mr. Unonius is the corresponding owner, having the direction and management of the trade of the ship

and cargo, and with whom I corresponded thereon." Here he first touches on the cargo, and says nothing whatever of Mr. Shaw, but distinctly puts the enemy in as the owner. [*Per Curiam*. You must bear in mind, *Queen's Advocate*, the terms of the interrogatory: "With whom do you correspond on the concerns of the vessel or her cargo?"] Certainly; but this is the first time the cargo is mentioned; and he makes no allusion whatever to the claimant. And to the twenty-first interrogatory he gives a most prevaricating answer, and professes to know nothing about the matter. He cannot tell whether or not the cargo, if it had arrived at its destined port, would have been the property of the consignees or of Mr. Shaw, or whether it was then their property, or to be sold by them for Mr. Shaw. This is a most unsatisfactory answer. The answer to the thirty-third interrogatory is still more unsatisfactory, for it merely refers to what he has said before, without giving any information whatever. The object of such interrogatories is to test and compare the answers of a witness; and this object is defeated if the examiner does not require full answers to each interrogatory, but allows the witness merely to refer to a former answer. [*Per Curiam*. Certainly that is quite correct; full answers must be taken to every interrogatory. I regret to find frequently in these cases that the evidence is not sufficiently full. I wish it to be understood, that in every case, the examiners are to take the evidence in full, and not to allow the witness under any circumstances to answer one interrogatory by a reference to his answer to another. Such a course defeats the object of the examination.]

Now, as to the papers, the bills of lading are dated March 7th. At that time the Russian ambassador had withdrawn from England, and war was closely impending. The vessel sailed from Cadiz in immediate contemplation of war. This accounts for the state of the ship's papers, upon which nothing turns. But annexed to the affidavit of claims are two bills of lading, and a certificate that Mr. Shaw is a British subject. The bills of lading bear an indorsement to the effect that the property mentioned therein belongs to Mr. Shaw. But what is the law? It is stated by *Pothier*, in a passage cited in a note to the "*Anna Catharina*" (a): "C'est aussi une chose qui est de la nature du contrat de vente, qu'aussitôt que ce contrat a reçu sa perfection par le consentement des parties, quoiqu'avant la tradition la chose vendue soit aux risques de l'acheteur, et que si elle vient à périr sans la faute du vendeur, la perte doit

1854.
THE
"FIDELTIA."
Argument.

In examining upon the standing interrogatories, it is the examiner's duty to take full answers to each question, and not to allow the witness to refer to his previous answers.

1854.
 THE
 "FIDELITY."
 Argument.

tomber sur l'acheteur, qui ne sera pour cela déchargé du prix ; mais comme cela est de la nature seulement, et non de l'essence du contrat de vente, on peut en contractant convenir du contraire." (a) This is the general law, and in the time of war or in immediate contemplation of war, it is not competent to parties to make particular exceptions to shift the risk. In the "*Packet de Bilbao*" (b) Lord *Stowell* says: "The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect;"—in this case the master swears he had consignees, "but that general contract of the law may be varied by special agreement, &c. In the time of peace they may divide their risk as they please, and nobody has a right to say they shall not ; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper." Certainly not ; but that would be done by special contract, and in this case they have not done so. Lord *Stowell* goes on to say : "In time of war this cannot be permitted, for it would at once put an end to all captures at sea ; the risk would in all cases be laid on the consignor, where it suited the purpose of protection. On every contemplation of a war this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of the rights of capture : it is, therefore, considered to be an invalid contract in the time of war, &c." Supposing this contract to have been made in this case, it must have been, on the 7th of March, made in immediate contemplation of war, and could not therefore be sustained. The "*Packet de Bilbao*" establishes this, that *primâ facie* goods shipped belong to the consignee. This is the doctrine laid down in *Abbott on Shipping*. (c) In this case there is not the slightest evidence to rebut the presumption of law. The property must therefore be considered as belonging to the enemy consignee.

Dr. *Addams*, for the claimant, was stopped by the Court, and

Judgment.

DR LUSHINGTON said: I will hear you, Dr. *Addams*, if you think you can satisfy my mind that it is a case in which I can order immediate restitution. I am clearly of opinion that you are entitled in this case to give further proof ; but I do not think I could possibly decree restitution without it, for unfortunately the evidence of the master is by no means satisfactory, and it is a rule of the Prize Court, that where the

(a) *Pothier, Traité des Obligations*, part i. c. i. § 1. art. i. § 3.

(b) 2 C. Rob. 133.

(c) 9th edit. p. 269.

evidence of the master fails as to the ownership of the property claimed, further proof is indispensable before restitution can be decreed.

The case stood over for further proof.

Proctors: for the captors, *The Queen's Proctor*; for the claimant, *Rothery*.

1854.
THE
"FIDENTIA."
Judgment.

THE "ABO," *G. A. Goös*.

THIS vessel, a Russian, which sailed from Cadiz on the 27th February 1854, was bound to Abo, with a cargo of salt, olive oil, and other goods, and was captured on the 15th April, by her Majesty's ship "Tribune."

No claim was given for the ship, but Mr. Quincey Rew of Old Broad Street, gave a claim for seven pipes, four hogsheads, and eight quarter casks of olive oil, and a box containing 1000 leeches, on behalf of Charles Younger, a merchant of the city of Cadiz, and a British subject, as the sole owner and proprietor thereof. Annexed to the affidavit and claim was a bill of lading, signed by the master, acknowledging the receipt on board his ship of the property claimed, and binding himself, on his safe arrival, to deliver the same to Messrs. E. Julin and Company or order, against a stipulated freight, &c. On this bill of lading was the following indorsement:—

"British Consulate, Cadiz, 2nd March 1854.

"These are to certify that on this day personally appeared before me, Charles Younger, a British merchant and Swedish consul, residing in this city, and voluntarily declared, upon oath, that the seven pipes, four hogsheads, and eight quarter casks of olive oil, and one box containing 1000 leeches, as described in the annexed bill of lading, are *bonâ fide* his own property, and have been shipped on his sole account and risk on board the Russian ship "Abo," *G. A. Goös*, bound for Abo.

"Given under my hand and seal of office, at Cadiz, on this 2nd day of March, in the year of our Lord 1854.

"M. BRACHENBURG, Consul."

The master of the captured vessel, being extremely ill, was put ashore at Copenhagen by the commander of the "Tribune," and his examination on the standing interrogatories was, therefore, dispensed with. The mate, second mate, and one seaman, were examined.

The *Queen's Advocate*, for the captors.

ADMIRALTY PRIZE COURT.

July 21.

A Russian vessel sailed from Cadiz on the 27th February, bound to Abo, with a cargo of salt, olive oil, &c. On the 2nd of March the shipper, a British subject, resident there, made an affidavit before the British consul, that the olive oil was his property. The vessel was captured on the 15th of April. A claim was made on behalf of the shipper for this olive oil. Further proof allowed.

Statement.

Argument.

1854.
THE "ABO."
Argument.

The affidavit of claim in this case is insufficient. It should state, not only that the claimant believes the property claimed belonged *bonâ fide* to Mr. Younger at the time of shipping and the time of capture, but that he believes that if restoration be decreed, the property will then also belong to him. That is the proper form as given in Dr. Pratt's book of the practice of the Prize Court. (a) He submitted that, from the evidence, the property appeared to belong to Messrs. Julin and Company, the assignees, who were, as appeared from the certificate of the Burgomaster of Abo, part owners of the vessel. They were mainly interested. The bill of lading shows the goods were to be delivered to them. There is nothing to support the present claim but the indorsement made upon the bill of lading before the British consul at Cadiz by the claimant himself. That indorsement was made on the 2nd of March, five days after the ship had sailed. Such an act on the part of Mr. Younger cannot affect the property. The property must be judged at the time of shipping; and at that time the property being delivered to the master, as carrier, must be considered to have been parted with to the consignee.

Dr. *Dasent*, on the same side. It is a rule of law that goods shipped are the property of the consignee, unless the shipper in any way limits that right. This property was consigned, absolutely and without limitation, to Messrs. Julin and Company, the part owners of the ship. There is no evidence whatever of any limitation; the indorsement on the bill of lading before the British Consul, being made after the sailing of the ship, and in immediate contemplation of war, was, in all probability, merely colourable.

Dr. *Addams* and Dr. *Twiss*, for the claimant.

The affidavit accompanying the claim is correct. It is quite sufficient for the agent to state his belief that, at the time of capture and of the claim, the property belonged to the party for whom he claimed. [*Per Curiam*. The objection in this case cannot be sustained. I think the affidavit sufficient; but, in order that the practice may be in all cases uniform, I will have the forms searched up, and adopt one regular mode of proceeding.] There is nothing whatever in the evidence to impeach the claim. The property remained in Mr. Younger the shipper, and had not been transferred to Messrs. Julin and Co. The indorsement on the bill of lading, before the public notary, is strong evidence of that; for unless it be true, and made *bonâ fide*, it might as well have been made for the whole of the cargo, and not merely for a part. The whole transaction was antecedent to the war, and the circumstances resemble those of the

(a) Story's Prize Practice, by Pratt, p. 211.

"*Packet de Bilbao*" (a), in which Lord *Stowell* restored the property to the claimant shipper. If the Court should not hold the evidence sufficient at present for restitution, it will not, in such a case, refuse to allow further proof.

The Queen's Advocate, in reply.

According to the ordinary course of trade the property vests in the consignee, and if the shipper or consignor desires to retain his right to the property, he names himself in the bill of lading as the consignee, and the engagement with the master of the vessel is expressly to deliver to him or his assigns: *Abbott on Shipping*. (b) This might have, but has not, been done in the present case. Again, the same author says: "Where goods are sent by a vendor to a vendee, the delivery of them to the carrier usually vests the property in the latter, and he is the person to sue the carrier for the loss of them." (c) So in this case Mr. Younger's property was divested on delivery to the master, and could not be re-vested by his declaration before the consul. [Dr. *Twiss*. There is an essential difference between vendee and consignee.] Unless the contrary be shown, which has not been done, the presumption is that they are the same. To support the present claim there is nothing whatever but the solitary affidavit of the claimant made after he had parted with the property.

1854.
THE "ABO."
Argument.

Dr. LUSHINGTON. I think it is expedient in this case to address myself first to the primary evidence, viz. the papers found on board the ship, to the examination on the interrogatories, and to the facts admitted. It is admitted that this is a Russian ship, and that part of the cargo is Russian property. There is no claim for that, which will, therefore, of course, be condemned. A claim, however, has been set up on behalf of a gentleman stating himself to be a British subject resident at Cadiz; but, as far as any rule of law can be applied, this gentleman holds a Spanish national character, and not that of a British subject, because it is a very just principle, that in time of war a person is considered as belonging to that nation where he is resident, and where he carries on his trade.

Judgment.

Rule of law that in time of war a person takes the national character of his residence.

Now, with respect to the papers found on board the ship, independently of what I may more properly call the ship's papers, there is a bill of lading for a quantity of salt and other articles, which are admitted to be Russian property and liable to condemnation. There is also another bill of lading, which contains an order to receive certain specified articles from Mr.

(a) 2 C. Rob. 133.

(b) 9th edit. p. 267.

(c) *Abbott on Shipping*, 9th edit. p. 269.

1854.

THE "ABO."

Judgment.

The transaction was not affected as to the legal consequences, by the state of the relations existing between England and Russia at that period; the cargo not having been shipped
flagrante bello.

Younger, the gentleman on whose behalf this claim is made; but it is to be remarked that this bill does not state on whose account and risk this shipment was made, but it bears date on the 24th of February, three days before the vessel sailed.

The Court has heard much as to what was the state of things as regards persons carrying on trade at the period when this transaction took place. It has been contended that at that time the Russian ambassador had quitted Great Britain, and that a declaration of war might be considered as imminent; but it did not take place until the 29th of March following. I am, however, of opinion, that, in such a state of things, the rights of neutral merchants to carry on their trade were in no degree altered. It would be utterly impossible to fix a period at which, in consequence of the probability of hostilities, they were to be deprived of their accustomed rights; but it is perfectly true that, if in so carrying on their trade shortly antecedent to the commencement of a war, and when it is known to be imminent, they resort to any practice which is not customary in a time of peace, their conduct lays them open to the suspicion of covering an enemy's property under the guise of their neutral character. If this cargo had been shipped, to use the expression of Lord *Stowell*, *flagrante bello*, the bill of lading ought, on the face of it, to have expressed for whose account and risk the property was shipped. On this point it is silent; but I know of no law that a neutral merchant may not, if he thinks fit, ship property without saying on whose account and risk it is so shipped; it is, I believe, customary not to state on whose account and risk the property is shipped, though sometimes it is done.

The "*Packet de Bilbao*" not strictly applicable to the case.

It has been contended that I ought to conclude the property to be in the consignee, and that therefore there is an end to the claim of the consignor. In support of this argument the "*Packet de Bilbao*" (a) was cited, but, on referring to that case, I cannot think it furnishes sufficient authority for what I am asked to do on the present occasion, viz. merely attend to the bill of lading. The heading of that case is this: "Shipment at the risk of consignor till delivery; allowed as being made before the war. Particular mode of Spanish trade." So that, *primâ facie*, it does not appear to be an authority for the captors; but some remarks of Lord *Stowell*, in the course of his judgment, have been relied on, and I must say that more important words could scarcely be found in any documents. What Lord *Stowell* said was this, that where goods had been ordered

by the consignee and delivered to the master, they were to be considered as delivered to the consignee. To this proposition I fully accede; but I apprehend that, when the goods have not been ordered, a very different state of things exists; it is a most important ingredient, in considering the question of the property, that the order should have been given by the consignee. Throughout the whole of that case the remarks of Lord *Stowell* have reference to such a state of circumstances, and I give unqualified assent to them; but I do not consider them any authority to govern my decision in the present case, in which the circumstances are different.

I was also referred to *Abbott on Shipping*, and I would here observe that it is always important to bear in mind that there is a totally different question arising in the Prize Court from that which arises in a Court of Common Law. At Common Law it may be very true that, by a bill of lading, property may be so vested in the consignee that he may be capable of selling it, though he would be responsible to the consignor. It may be true that, between the consignor and third parties, he would have a good title to sell, but that is not the question which the Court looks to here. This Court inquires in whom the property is vested, and not merely at what is called a legal title at Common Law. Lord *Tenterden* says: "Where goods are sent by a vendor to a vendee the delivery of them to the carrier usually vests the property in the latter." (a) *Usually*, but not always; there are excepted cases. To this proposition I also assent; but it must be remembered that it refers to a question between a vendor and vendee, and that the question now to be considered is between a consignor and consignee, and I know of no principle laid down in the Prize Court, by which I am bound to hold that under such circumstances as the present, the consignor has divested himself of his right and title. There are innumerable cases in which a merchant may send property to some agent—some consignee, and yet retain a right and control over it. There are innumerable instances where goods are sent to a consignee without previous order or direction, and, in a great many cases, without previous communication with the consignee himself. I cannot think that the hands of the Court are tied in this case by anything decided by any of the authorities to which I have referred.

How stands the case now? I have the bill of lading, and nothing else. Unfortunately I have not the benefit of the master's evidence; no blame attaches to any party for the absence of his examination, for it was a matter of necessity and

(a) *Abbott on Shipping*, 9th edit. p. 269.

1854.
THE "ABC."
Judgment.

The questions as to the property in goods shipped for a voyage are subject to different considerations in Courts of Prize and Courts of Common Law.

Considerations applicable to a vendor and vender are not necessarily so to consignor and consignee.

The master's evidence being unavoidably wanting, and there being nothing to guide the Court but the

1854.

THE "ABO."

Judgment.

indorse a bill
of lading, the
Court is bound
to direct
further proof.

In the first
instance the
Court should
look only to
the *fact*, and
not to any
evidence of
the claim.

humanity, and it may be said to be a common loss to both parties. It might be that the master would prove it to be enemy's property, and condemnation would follow; on the other hand, he might prove it to belong to a neutral, and restitution would be decreed. It is impossible to conjecture what evidence he might have given.

How, then, is the Court to deal with the case in the unavoidable absence of the evidence of the master? I apprehend that, according to ordinary usage, that circumstance opens the door to further proof, supposing the other circumstances of the case are such as to justify such a course.

I now come to the affidavit of claim; and I will here observe that the Court, with great reluctance, looks beyond the mere affidavit of claim. I apprehend the course of the Court to be this: in the first instance, the Court considers the evidence, whether found on board the ship, or taken on the preparatory examination, and the *fact* of the claim only. In perfect strictness, the Court ought to attribute no weight to any document brought in and annexed to the affidavit of claim. Such documents are altogether *ex parte*, and entitled to but little weight.

In the present case there is annexed to the affidavit a bill of lading of the property claimed, with an indorsement made by the British consul at Cadiz, after the ship had sailed, to the effect that the property belonged to Mr. Shaw. The Court must be destitute of common sense, if it did not see for what purpose this indorsement was made. It was clearly made for the express purpose of doing that which he had previously omitted, in order to give the appearance at least of its being the property of the claimant. It is manifest that no great reliance can be placed upon a document so framed. I may observe that, in the present state of the world, and the present state of commerce, one cannot expect to find such lengthened correspondence as in former times. Then, there were a variety of documents on board ship relating both to ship and cargo, which now, from the great change of circumstances, we can hardly expect to find on board a vessel at the commencement of a war.

Looking at the whole of the case I entertain no doubt whatever that it is the duty of the Court to order further proof.

Proctors: for the captors, the *Queen's Proctor*; for the claimant, *Rothery*.

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ADMIRALTY
PRIZE COURT.

July 21.

A neutral's share in a ship sailing under the flag and pass of an enemy is liable to condemnation.

The cargo shipped under a charter-party restored to the neutral charterers.

Statement.

Argument.

THE "PRIMUS," *Müller*.

THIS vessel sailed under a charter-party early in the month of March last, under Russian colours, and with a Russian pass, from St. Ubes, with a cargo of salt bound to Elsinore for orders. At Elsinore she received orders to proceed to any Russian or Finnish port, and accordingly put into Maarsund, a port in the island of Aland, where she delivered half of the salt into small boats to be sent to Abo, then sailed on the 7th of May with the remainder of the cargo, and was captured on the following day by her Majesty's ships "Valourous" and "Vulture."

Four claims were given in: one for 2-8ths shares of the vessel, another for 3-8ths, both on behalf of Russian subjects; a third for 3-8ths, as the property of Johan Gustaf Bergborn, of Altona, a subject of the King of Denmark; and a fourth for the cargo of salt, as the property of Messrs. Banck and Durkoop, citizens and burghers of the Free Hanseatic town of Hamburg. The first two claims having been abandoned, the argument was confined to the third and fourth.

The Queen's Advocate and Dr. *Haggard*, for the captors.

The claim of Mr. Bergborn cannot be supported. If he be a neutral, his shares in this vessel are liable to condemnation, for the law clearly laid down by Lord *Stowell* in the "*Vrow Elizabeth*" (a) is, that neutrals cannot claim on the ground of their neutrality, a vessel sailing under the colours and pass of the enemy. It is, as far as the belligerents are concerned, enemy's property. Besides, it is very doubtful from the evidence whether this gentleman is a neutral. He has been living in Russia all his life, and only removed to Denmark in the year 1852. There is no proof of his title to these shares. The only bill of sale among the papers is for 3-4ths of the vessel, which does not correspond with the present claim, which is for 3-8ths. The bill of sale under which he claims is not forthcoming.

As to the cargo, it is claimed by a Hamburg merchant under a charter-party; but, looking at the ship's papers, there are various suspicious circumstances. In the bill of lading the

(a) 5 C. Rob. 4. To which case a note is appended, to the effect that in the case of the "*Vrede Skoltys*," the Court observed, "A great distinction has been always made by the nations of Europe between ships and goods. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but

this country has never carried the principles to that extent. It holds *the ship* bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the state may be differently considered."

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THE
"PRIMUM."
Argument.

destination is, "for Baltic or orders." Nothing could be more vague. In the certificate of the Russian consul there is the same vagueness as to the destination, and it is silent as to the charter-party, and as to the interest of the claimant. The charter-party, too, speaks of the vessel being chartered for a voyage from St. Ubes to a port in the Baltic, calling at Elsinore for orders; but, in article 9., speaks of the captain's arrival at Hamburg or Altona. There is a discrepancy between this and the bill of lading, for certainly Hamburg is not in the Baltic. The conduct of the master throws further suspicion on the case; he breaks bulk, and sells a part of the cargo, either without or against orders. Under these circumstances the claim cannot be sustained.

Dr. *Addams* and Dr. *Twiss*, for the claimants.

The doctrine that neutrals sailing under the flag and pass of the enemy are liable to have their ships condemned, does not apply to such circumstances as the present — just in the very commencement of a war. Under such circumstances the neutral cannot be precluded from his claim. No case whatever has been produced to that effect.

As to the cargo, the case is clear: the charter-party is perfectly regular, and there is nothing in the ship's papers or the evidence to impeach it. The Court must, therefore, restore this cargo without requiring any further proof.

Judgment.

Whoever embarks his property in shares of a ship is bound by the character of that ship, and, consequently, neutrals are not entitled to restitution of their portion of an enemy's vessel.

DR. LUSHINGTON. There are two questions to be disposed of in this case; the one regarding certain claims for a share in the ship, and the other relating to the cargo. The first is a pure question of law, whether the persons who now claim, and who are admitted, for the purpose of argument, to be neutral subjects, are entitled to have the ship restored. On the part of the Crown it has been contended that the flag and pass are binding upon all persons having property or shares in the ship. In support of this principle, authorities have been brought before the Court which must govern it in this and all similar cases. The only distinction attempted to be established in the present case is, that this is property in the vessel belonging to neutral subjects, which existed antecedent to the breaking out of the war. It has been argued that I ought to take notice of that distinction, but I apprehend that not only the authority of Lord *Stowell*, but every argument he used, go the whole length of saying, that whoever embarks his property in shares of a ship, is bound by the character of that ship, whatever it may happen to be. If he reap the benefit accruing during peace, he must also take the consequence of war. Unless this were so, it

would be very difficult to find out the time when neutrals would cease to have an interest in an enemy's ship. I am of opinion that this great principle is one that ought not to be infringed.

Another argument has been addressed to the Court, which, if valid, would place the Judge of this Court in such a predicament as no Judge was ever placed in before. It arises from the terms of her Majesty's Order in Council (a) of the 29th of March, which requires me to take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods, that are or shall be taken, and to hear and determine the same; and, according to the course of Admiralty and the Law of Nations, to adjudge and condemn all such ships, vessels, and goods as shall *belong to the Emperor of all the Russias, or his subjects, or to any others inhabiting within any of his countries, territories, or dominions.*" It is contended that it is not within the terms of my commission to condemn this vessel, and that I am restricted to the condemnation of ships exclusively belonging to Russians. If this were the true construction of the Order in Council it would go to show that the Court has no power to condemn neutral vessels committing a breach of blockade, or carrying articles contraband of war, because they did not belong to subjects of the Emperor of Russia. Certainly no Judge who ever occupied this chair before was so tied, nor have I any intention to place such manacles upon my own hands. I must remind the learned counsel that the principle which governs the proceedings in this Court is to condemn *as enemy's* property all which is not entitled to be restored by the Law of Nations. To establish a title to restitution, it ought to be perfectly clear that the property does not belong to an enemy; and where the claimant fails to establish that, the property is condemned as enemy's property.

Without further adverting to the general law or the terms of the commission I now hold, I have no doubt that I ought to condemn the 3-8ths of this ship, which have been claimed on behalf of a neutral.

I now come to consider the claim for the cargo. The transaction was this: — This was a Russian vessel, and in the early part of the present year she was lying at Ardrossan, in Scotland. She was at that time engaged in peaceable commerce with Great Britain. A charter-party was entered into early in January by certain merchants at Hamburg, under which she was to sail to St. Ubes for a cargo of salt to be conveyed to the

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"PRINCE."

Judgment.

The Court has full authority to condemn property which is condemnable by the Law of Nations, whether such property belongs to Russian subjects or not.

The transaction respecting the charter-party was probable and legal, and evinced no fraudulent purpose.

(a) Appendix, p. 2.

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Judgment.

The other
facts of the
case afford no
ground what-
ever for sus-
picion.

Baltic. I must here observe, that this was a transaction of trade consistent with ordinary probability, and I think it fair to presume that it was done *bonâ fide*, because, at the period when it took place, it was scarcely possible that there could have been a fraudulent intention. Neither do I see anything in the terms of the charter-party to excite my suspicion. Exceptions have been taken to an alleged discrepancy in the documents; but to my mind it is perfectly clear what the intention was. The vessel was chartered to carry the cargo to the Baltic to be sold for the benefit of the freighters, who were resident at Hamburg. I see no illegality in this; and it appears to me that a fair foundation is laid for this claim.

What are the other facts of the case? The master distinctly swears that the property does belong to the claimants; I have also the bill of lading; but it is said the bill of lading does not mention at whose risk the cargo is shipped; but I think that at the commencement of a war it would be too much to assume that every omission of a wise precaution is an evidence of a fraudulent intention.

As to the objection that the master has broken bulk, it appears that a part of the cargo was unladen by order of the Government of Russia, and I do not think I should be justified in visiting on the claimants any order so made.

An objection has also been raised by the counsel for the Crown, that the log of the captured vessel is not in evidence, and the Court has been asked to delay the conclusion of the cause for the purpose of having it brought in and translated. I must say that is an objection which it is not open to the captors to take. All the documents should be laid before the counsel for the captors, and it would be strange indeed if I should be asked to delay the conclusion of the cause because they had not put the necessary documents before the Court. I will not do so for two reasons; first, because the defect, if any, might have been discovered earlier; and secondly, because there is, in fact, no such defect, as the original log is before me.

Restitution of
the cargo
decreed.

I am of opinion that this claim is established, and I decree the restitution of the cargo as claimed.

Proctors: for the captors, the *Queen's Proctor*; for the claimants, *Rothery*.



AUSTEN *against* GRAHAM.

Before THE RT. HON. THE LORD JUSTICE KNIGHT BRUCE,
THE RT. HON. DR. LUSHINGTON, THE RT. HON. T. PEM-
BERTON LEIGH, AND THE RT. HON. SIR E. RYAN.

1854.

PRIVY
COUNCIL.Feb. 21. & 22.
March 31.

THIS was a suit instituted in the Prerogative Court of Canterbury, respecting the validity of the will of Mr. James William Graham, late of Grange Street, in the Hampstead Road, who died on the 20th of June 1849, of the age of sixty-six years, leaving personal property of the value of between 4000*l.* and 5000*l.*

The testator died a widower, without child or parent, leaving Robert Hay Graham, M. D., his natural and lawful brother and only next of kin, and the only person entitled in distribution to his personal estate and effects in case he died intestate.

On the 12th of June 1849, the deceased duly executed his last will and testament, and thereof appointed his brother, R. H. Graham, together with Henry Browne, executors, with legacies of 100*l.* each, and therein named Sarah Gear, spinster, Sarah Nix, widow, Henry Austen and his wife and children, Robert Graham and Margaret his wife, Henry Harris, and Alfred Curzon, legatees. The concluding clause was as follows: "After payment of these legacies I desire that my said executors shall hand over the balance remaining to the Turkish ambassador, or the person for the time being representing the same, such balance to be divided in such proportions as such ambassador or person aforesaid shall think fit amongst poor persons of the city of Constantinople; and also in the erection of a cenotaph, with a light burning therein, at Constantinople aforesaid, on which cenotaph my name and description may be engraved; but I hereby declare my executors shall not be bound to see to the execution of this my wish, any further than by handing over whatever balance may remain after such payments as aforesaid to the Turkish ambassador for the time being, or the person representing him as aforesaid. And I hereby revoke all former wills by me made; and I desire that I may be buried in St. Alban's churchyard, in the same tomb with my mother, and that the body of my son James shall be exhumed and buried with me; and it is my will that the said Sarah Gear shall follow me as chief mourner."

The will of an eccentric person, strongly imbued with Eastern notions, and attached to Eastern customs, in which money was left for the erection in Constantinople of a cenotaph, with a light burning therein, and with the name and description of the testator engraved thereon, and in which the residue was left to the poor of Constantinople,—*Held*, in the Prerogative Court, partly from its *sounding to folly*, and partly from the evidence of the drawer and one of the attesting witnesses, to be invalid; but pronounced by the Court of Appeal, reversing the judgment of the Court below, to be the act of a capable testator, and, therefore, valid.

State next.

With regard to his brother there was the following clause: "Inasmuch as many years ago I gave up my share of the property of my late father to my dear brother Robert Hay Graham, M. D., who has since that time been in the enjoyment

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of it, I do not think it necessary to make him any bequest, except as hereafter appears, seeing that he has already been largely benefited by me."

This will was duly attested by Mr. Fisher and by Mr. William Francis Ellaby, a solicitor.

The cause was originally promoted and the will propounded by Mr. Henry Browne, one of the executors, but subsequently he declared that he proceeded no further. Whereupon a decree was extracted, citing the several legatees to appear and propound the will, or show cause why letters of administration of the goods of the deceased, as dead intestate, should not be granted to Dr. Graham as the only next of kin. Mr. Henry Austen, one of the legatees, appeared, and propounded the will.

Besides the instrument propounded there were other papers of a testamentary character before the Court. On the night of the 7th of June 1849, the deceased was taken very ill, and two medical gentlemen of the name of Browne, father and son, were sent for and remained with him during the night. At his request, and from his dictation, one of them took down the heads of, or instructions for, a will, which was signed by him, item by item, and attested. By these instructions marked C. and D., and dated June 8th 1849, legacies were left to Sarah Gear, to Mr. Henry Austen, to Mrs. Gear, the mother of Sarah Gear, to his cousin Robert Graham, to Mrs. Austen, and to Mr. Henry Harris; and Dr. Graham, the brother of the deceased, and Mr. Henry Browne, were appointed executors. The residue was not disposed of. He also dictated the several items of his property in the paper marked E.

In consequence of the informal state of these papers, Mr. Browne, two or three days afterwards, suggested to the deceased that it was desirable that his wishes should be carried out in a more formal manner, and at the request of the deceased, sent Mr. Ellaby, a solicitor, to him for that purpose. On the 11th of June Mr. Ellaby drew a will for the deceased from the instructions above mentioned, but finding the residue undisposed of, mentioned the circumstance to the deceased. The conversation which ensued, and the consequent disposition of the residue, were fully detailed in the judgment. This will, the paper marked B., was duly executed on the 11th of June, in the presence of Mr. Ellaby and Mr. Macdonald. In consequence, however, of Mr. Ellaby having some doubt of the validity of the residuary bequest, inquiries were made, and on the following day that will was cancelled by Mr. Ellaby, at the request of the deceased, and the will propounded in this cause was executed in the presence of Mr. Ellaby and Mr. Fisher. It is

almost identical with that of the 11th of June, except that in the concluding clause, after the words "on which cenotaph my name and description may be engraved," the words "*and where prayers may constantly be offered for me,*" were omitted.

The will was propounded by Mr. Browne in a common *condidit*, in which the deceased was described as "formerly a major in the East India Company's service, who had passed much of his life in Eastern countries, and was for many years, and to the time of his decease, *a professor of the Mahometan religion.*"

A special allegation was afterwards given in by Mr. Austen, pleading the history of the deceased, his proficiency in several Eastern languages, his familiarity with the mythologies and religions of several Eastern nations, and with their opinions, customs, and habits, many of which he liked and adopted, and *that* in consequence he was generally called and known as "Hindu Graham;" *that* he openly favoured and approved of the Mahometan and Hindu religions, and occasionally professed his belief therein and practised some of their forms and ceremonies; *that* he frequently corresponded, conversed, and associated with natives of India and other Mahometans when opportunities occurred until the period of his death; *that* he strongly espoused the cause of the Rajah of Sattarah, and was for several years, and up to within a fortnight of his death, employed as interpreter and translator by his representative in this country; *that* principally by reason of his Eastern habits and of his cohabitation with Sarah Gear he lived in seclusion, and did not associate much with his equals.

It also pleaded *that* the deceased was a man of sound mind, and was at all times treated as such by his brother, Dr. Graham, who often remonstrated with him on his habits, opinions, and manner of life; *that* after the execution of the will propounded, his said brother endeavoured to persuade him to revoke or alter it, and also requested Mr. Curzon, a friend of the deceased's, to get him to make a codicil in his (Dr. Graham's) favour.

A responsive allegation, given in on behalf of Dr. Graham, pleaded in substance, *that* in May 1849, the deceased became very unwell, suffered much from asthma and suffusion of water on the chest, and in consequence thereof became very weak and exhausted; *that* at such time, and until his death on the 22nd of June, the deceased laboured under a chronic disease of the brain; *that* his appearance, manners, and language, were strange and wild; *that* he was passionate in his temper, and inadequately and irrationally excited from trivial causes; *that* he frequently continued talking incessantly for hours together, in a wild, rambling, and incoherent manner, and until he became quite

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exhausted; *that* he wandered in talking from one subject to another without connection; *that* his attention could not be kept to one subject for any length of time, and *that* when asked about his health he gave absurd and irrational answers; *that* he bandaged and covered his face with handkerchiefs, and objected or refused to allow them to be removed, and declared that he did so "to prevent false impressions being made upon his mind;" *that* he sometimes refused to take any food whatever, or to take the necessary medicines, and declared that "it was contrary to his religious principles and to the will of God to do so," and that "all depended on the will of God;" *that* he also declared that "God and he were one," and that "he was next to God," and was "a second prophet," and that "he knew he should not die," or expressed himself in an irrational and insane manner to that or the like effect; *that* during the latter part of May 1849, and thenceforth down to the day of his death, the deceased was insane and of unsound mind, and incapable of making his will. It then pleaded, *that* whilst of sound mind the deceased always entertained and expressed great affection for his brother, Dr. Graham, the party in the cause.

A counter-plea was given in on behalf of Mr. Austen, to the effect *that* the only diseases under which the deceased then suffered, and of which he died, were bronchitis and organic affection of the heart; *that* he never suffered under, nor exhibited any symptoms of any disease of the brain, either acute or chronic; *that* he exhibited no illusion whatever, &c.

The cause was delayed for some time in consequence of the illness of the late Sir Herbert Jenner Fust, but was heard by the present learned Judge of the Prerogative Court on the 16th of March, and 20th and 28th of April 1852, and on the 26th of July following he delivered his judgment, and stated that if further evidence had been before him he should have been inclined to pronounce for the papers executed on the 8th of June; but that as to the will of the 12th, his opinion was that the deceased was of unsound mind when he executed it, and therefore pronounced against it.

The present was an appeal from that judgment.

The Queen's Advocate and Dr. R. Phillimore argued on behalf of the appellant; Mr. Rolt and Dr. Twiss on behalf of the respondent.

Judgment.
March 31.

The judgment of their Lordships was delivered by the Rt. Hon. T. PEMBERTON LEIGH.

This is an appeal from a sentence of the Prerogative Court of Canterbury, pronouncing against the validity of an instrument

bearing date the 12th of June 1849, purporting to be the will of James William Graham.

It was not disputed that the instrument was properly executed and attested, and that its contents were in conformity with the intentions of the deceased so far as he was legally capable of forming any; but it was contended that the deceased was of unsound mind when the alleged will was made, and of that opinion was the learned Judge in the Court below.

The judgment appears to have been founded partly upon the inference to be drawn from an extraordinary bequest in the will, by which the residue of the deceased's property is given, after erecting a cenotaph to him in Constantinople, to the poor of that city, and partly upon parol evidence of wild and extravagant language and behaviour of the deceased about the time when the instrument was signed, and particularly upon the testimony of a gentleman of the name of Ellaby, a solicitor, who prepared and attested the instrument.

The deceased died on the 22nd of June 1849; he left neither wife nor child surviving him: his sole next of kin was his brother, the respondent, Dr. Graham, who was named as one of the executors in the alleged will, a Mr. Browne being the other.

The will was propounded by Mr. Browne, but Dr. Graham disputing it, Browne, on the 18th of April 1850, withdrew from the suit, and the parties interested under the will being cited, Mr. Austen, one of the legatees, on the 13th of June 1850, took up the proceedings, and filed a special allegation.

On the 13th of December 1850, Dr. Graham put in his answers to the allegation, denying the sanity of the deceased when the will was made; and on the 4th of March 1850, he filed an allegation on his own behalf.

It is important to attend to this statement, because it shows the nature of the mental disorder attributed to the deceased, and at what time and under what circumstances it is supposed to have commenced.

By the 1st article it is alleged that in the month of May 1849, the deceased became very unwell, and that during the latter part of that month, and thenceforth continually to the day of his death, to wit, on the 22nd day of June following, he was confined to his room, and principally to his sofa and bed. It then goes on to describe his sufferings from asthma, and suffusion of water on the chest, and alleges that in consequence he became weak and exhausted. The 2nd article alleges "that during the period in the next preceding article mentioned, the deceased was labouring under a chronic disease of the brain — that his appearance, manners, and language, were strange and wild."

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It is not disputed that the instrument was properly executed, and was in conformity with the intentions of the deceased.

The judgment of the Court below appears founded upon the extraordinary bequest of the residue, and upon parol evidence of extravagant language of the deceased about the time of the execution of the will.

The circumstances of the case.

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The insanity attributed to the deceased is not monomania, but a general mental derangement, first appearing during his final illness.

It is necessary to inquire into the previous habits and opinions of the deceased; for conduct which would be absurd and irrational in one living according to English habits and believing in Christianity, would not be so in a native of India, or in one who had adopted its modes of life and believed in Mahometanism.

The 3rd article alleges, "that in and during the latter part of the month of May 1849, and thenceforth down to the day of his death, the said deceased was, and continued to be, insane and of unsound mind, and incapable of making his will." The insanity, therefore, here attributed to the deceased, is not monomania, or madness confined to a particular subject, but a general mental derangement, appearing for the first time while he was labouring under the sickness which a few weeks afterwards terminated his life.

With reference to this allegation, and the evidence adduced in support of it, we must examine into the life, habits, and opinions of this gentleman previously to the time when his insanity is alleged to have commenced; for the same behaviour, language, and testamentary dispositions, which would be absurd and irrational in a native of England, living according to English habits, and entertaining or professing a belief in Christianity, might not necessarily bear the same character when proceeding from a native of India, or from one who from an early period had adopted its manners and modes of life, and who entertained or professed a belief in Mahometanism.

It appears that the deceased, in very early youth, at the age of fifteen, and before, probably, religious principles had taken any deep root in his mind, was sent to India.

When there he associated principally with natives of the country; he devoted himself to the study of Oriental languages, and acquired an extraordinary proficiency in them, being familiar, as it appears, with the Hindustani, the Sanscrit, the modern Persian, and the Arabic. By these means he obtained and held for some time the appointment of interpreter to the Supreme Court of Judicature at Bombay.

In 1817, after a residence of nearly twenty years, as it appears, in India, he returned to England, when he contracted a marriage with a lady of the name of Austen, by whom he had one son, who died in his infancy; in 1821, he returned to India with his wife, who died there; and in 1832, he himself having lost a situation which he held in the East India Company, finally returned to England, and remained there till his death.

During his residence in England, between 1817 and 1821, it appears that he relinquished in favour of his brother, Dr. Graham, all the expectations which he might reasonably entertain to share in the property of his father (who was then living) at his death; and his father accordingly, on the 20th of March 1821, by his will, devised the bulk of his estate to his younger son, Dr. Graham, assigning as a reason for it, "that his eldest son, Captain T. W. Graham (the deceased) was already pro-

vided for by his own talents and industry, and had voluntarily relinquished all expectations from him."

This circumstance becomes very important in more than one view, with respect to what afterwards took place.

Of the opinions which this gentleman had formed, and the habits he contracted in India, Dr. Graham, in his answer to the 3rd article of the appellant's allegation, gives the following account:—

He says "that his brother associated much with the natives of India, and was familiar with the mythologies and religions of several Eastern nations, and with their opinions, customs, and habits, many of which he liked and adopted; and that, in consequence thereof, and also, as respondent believes, of his strange and extraordinary conduct and behaviour, he was generally called and known as 'Hindu Graham,' and also as 'Mad Graham,' and that he openly favoured and approved of the Mahometan and Hindu religions, and occasionally expressed his belief therein, and practised some of their forms and ceremonies."

Now, this is the description given of this gentleman at a time when, however eccentric his conduct might be, no question was raised as to his perfect competency to manage himself and his affairs.

He continued to entertain, or at least to profess these opinions, and to practise these customs, after his return to England, in 1832; he had no settled religious belief, affecting to take what he considered good of all religions; he studied the Koran and commentaries upon it, in Arabic, and other books in different Eastern languages, shunned the company of Europeans, and lived in a very small house in great seclusion, with a young woman of the name of Gear, who seems to have been his mistress when she was only sixteen years of age. All that we hear of his proceedings is connected with the East; the only employment of which we are told is that of translator of documents in the office of an envoy, whom the Rajah of Sattarah had sent over to this country, an employment in which he seems to have been engaged for more than two years before his death; and the only public matter in which we hear of his taking part is the advocacy of the Rajah's claims at the India House, and the promotion of the return to Parliament of a gentleman who it was understood was to advocate them in the House of Commons. In all money matters he was precise and exact, and lived with great economy on a very small income.

In the midst of these engagements, and in the month of May 1849, he was attacked by the illness of which in the following

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month he died. He consulted in the first instance Dr. Riding, a physician who attended him till the 8th of June, when, being dissatisfied with the effect of the remedies which had been prescribed for him, he determined to resort to other advice.

The complaint under which he was labouring was of a very alarming character, and was attended, as Dr. Riding describes it, with paroxysms or fits of difficulty in breathing.

On the night between the 7th and 8th of June, when he was suffering from these paroxysms, which he thought (very probably erroneously) had been aggravated by the medicines prescribed for him, he determined to send for the apothecaries who had attended him on some former occasions, — two gentlemen, a father and son, of the name of Browne, who carried on business as surgeons and apothecaries in the neighbourhood of his residence.

He was immediately visited by Mr. Browne, junior, and what then took place is stated in that gentleman's answer to the 9th interrogatory.

Upon carefully comparing this gentleman's evidence with the documents to which it refers, there is a discrepancy between the evidence and the instruments, which was not observed upon, either in the Court below, as it should seem, or before us at the Bar, but which serves to remove one difficulty which had occurred to us, in comparing the will of the 8th of June with that which is now in question. By the first, the four Great North of England Railway shares are given absolutely to Sarah Gear; by the latter they are given to her only for life; but by Mr. Browne's testimony it appears that the latter bequest was what the testator really meant, for the words attributed to him are: — "I have four North of England shares, which I should wish to be held in trust; the *interest* to be for the benefit of Sarah Gear."

Some hours after this transaction had taken place, Dr. Riding called to see his patient, who mentioned the fact of his having made his will, and his satisfaction at having done so.

It is impossible, we think, for any will made in the extremity of bodily sickness to be more free from suspicion, or to show more power of thought, judgment, and reflection, than that of which an account is thus given by Mr. Browne. The proposal to make it originates with the testator; the urgent reasons for making it are stated by him; he enumerates carefully and accurately the different items of which his property consists; he dictates every bequest; he assigns the reasons for those which he makes, and for omitting one which might naturally have been expected to be found there; and, considering the little affection

No will made in bodily sickness could show more power of thought, judgment, and reflection than that made upon the 8th of June.

which subsisted between himself and his brother (a fact which is fully established by the evidence), and what he had already done for him, the will seems as reasonable in all its provisions as any which could be suggested. We collect it to have been the opinion of the learned Judge in the Court below, that if this will had been propounded, it must undoubtedly have been admitted to probate, and if nothing further had been done by the testator, we should entirely have concurred in that opinion.

It occurred, however, unfortunately, to Mr. Browne, senior, a day or two after this will had been made, that it would be better that the testator's intentions should be carried out in a more formal manner, and he made this suggestion to the testator, — a tolerably strong proof that he at least had no doubt of the testator's capacity at this time. The testator adopted the suggestion, and Mr. Ellaby, a solicitor (an acquaintance of Mr. Browne's), was called in.

On the 4th of June, about three o'clock in the afternoon, this gentleman attended with Mr. Browne, senior, at the house of the deceased, and his evidence throughout is very remarkable. The two papers containing the existing will which had been written by Mr. Browne, junior, were shown to him, and he says "that he was asked if they were a legal or valid will;" he told them, "No," adding, "that they would do for instructions, but that he had better draw up a proper will." The statement that these papers did not contain a valid will seems very extraordinary from a professional man.

He took these papers, however, as instructions, together with a copy of the list of the testator's property, which had been made out by Mr. Browne, junior, and from these materials, he tells us, that before he saw the testator, he prepared the draft of a will; that he was afterwards shown into the testator's bedroom, where the testator was lying, to whom he read over the draft. After a great deal of conversation, he says he called the testator's attention to the fact that the residue of his property was undisposed of. After some consideration the testator stated that he had been thinking of an eleemosynary bequest; and as he had been talking much about the Turks and Constantinople, and had told Mr. Ellaby that he was a Mussulman, Mr. Ellaby says he suggested that perhaps he would like to leave the residue to the poor of that city. He approved of this suggestion, and said that he would adopt it, and would have a cenotaph erected to himself at Constantinople, where a light might be kept constantly burning, and prayers be said for his soul.

A will was finally prepared, containing a bequest to this

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Which would have been clearly entitled to probate, if nothing had subsequently occurred.

The evidence of Mr. Ellaby, the solicitor, is very remarkable.

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Mr. Ellaby
seems to have
had no doubt
of the de-
ceased's capa-
city.

effect, dated and executed on the 11th June, and attested by Mr. Ellaby, who had prepared it, and by Mr. M'Donald, an assistant of Mr. Browne, senior, and who was in the house as the medical attendant of the deceased. Before Mr. Ellaby retired the testator expressed a wish to communicate to the Turkish ambassador the bequest which he had thus made, and as Mr. Ellaby suggested some doubts about the validity of the bequest of the residue, it was arranged that he should call again on the following day, and see the testator on the subject.

Mr. Ellaby's doubts at this time were confined to the validity of the bequest of the residue, and were founded on its extraordinary character; doubts as to the testator's capacity to make any bequest he appears to have entertained none.

The result of Mr. Ellaby's further consideration was, that it would be better to omit the direction in the will of the 11th, that prayers should be offered for the testator at the cenotaph, in Constantinople; and he therefore had the will re-copied, with that alteration, in order that in its altered form it might be re-executed — an alteration hardly, under any circumstances, of sufficient importance to make it worth while to have a new will, but which it is utterly impossible to suppose that Mr. Ellaby would for one moment have contemplated carrying into execution if he had found the testator on the 12th in his opinion less capable of testamentary disposition than he had been on the 11th; or if he (Ellaby) had then conceived doubts as to the testator's sanity, which certainly had not entered his mind on the preceding day.

He went again to the testator's house on the 12th, about three o'clock, with the copy of the new will, and he found there two gentlemen from the Turkish ambassador's office, who had been sent there in consequence of the testator's wish to explain what he had done by his will for the poor of Constantinople. The gentlemen, natives of Turkey, were at that time in conversation with the testator; one of them, Mr. Zohrab, has been examined as a witness; he speaks to the conversation which he had with the testator, which lasted about half an hour, and in which the testator professed himself to be a Mahomedan, and he concludes his testimony with these words: —

"The said deceased was very ill at the time, but he was perfectly sensible, and was perfectly conscious that his dissolution was approaching; his bodily strength was prostrated by illness, but he had a great deal of energy of mind about him, and he was, in my opinion, when I then saw him, of sound and perfect mind, memory, and understanding, and fully capable of making his will, and of doing any other act of business of that or the

Both Mr. Zeh-
rab and
Mr. Fisher,
the attesting
witness, de-
pose strongly
to the de-
ceased's capa-
city at the
time of the

like nature, requiring thought, judgment, and reflection. I am a Christian myself, and the only peculiarity I remarked in the deceased was his being, or professing to be, a firm believer in Mahometanism in a Christian country, and having been brought up a Christian. He appeared to have studied the Koran a great deal, and he quoted from commentaries upon it."

Is it possible to have more exclusive or more unexceptionable testimony than this as to the testator's state of mind, or applying more directly to the time of the execution of the will in question. Immediately after these gentlemen had left the room the new will is executed, and attested by Mr. Ellaby and Mr. Fisher, a neighbour of the testator, who was sent for to be a witness.

Mr. Fisher, in his evidence, says:—I conversed with the testator, both before and after the signing of the said will; he did not seem to be in any pain; he was lying on the bed, quite airy and comfortable. I said to him, "I am sorry to see you so ill, Mr. Graham;" and he answered, "Oh, I am not so ill; my lungs and my constitution are good, but I am troubled with this phlegm;" and he patted his chest in a manner which I considered as indicating the soundness of his chest and lungs. The deceased and I then kept on conversing, while the other gentleman was doing some writing to the will; what that conversation was I do not remember. Then came the signing of the will, and when that was finished I wished the testator good bye. This is what I recollect took place. The deceased was upwards of sixty years of age, I imagine. He did not seem to me to be very ill at the time — he spoke cheerfully; he was reclining on the bed when I first saw him, but he got up in his bed to sign the will. I believe the deceased to have been, on the occasion to which I have now deposed, perfectly sane, of perfectly sound mind, memory, and understanding; perfectly capable of making his will, and perfectly capable of doing any serious or rational act of that or the like nature, requiring thought, judgment, and reflection.

Surely this is evidence entitled to very great weight. This is no stranger called in to witness the mere formal act of signing a paper, but a person who had a previous acquaintance with the testator, who could judge whether there was anything unusual in his language and demeanour, who holds a conversation with him for some time, and states some of its particulars, and who speaks in the most unhesitating terms to his perfect sanity.

Zohrab's evidence extends to the moment before the will is executed. Fisher speaks to the moment of execution; the evi-

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execution of
the instrument
now pro-
pounded.Mr. Fisher's
evidence en-
titled to very
great weight.

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Mr. Ellaby himself states that he had no doubt of the deceased's capacity.

What passed subsequently to the execution of the will is of minor importance.

The arts which the deceased professed to believe were once believed by the most learned men in Europe, and are still believed by many Eastern nations.

The deceased was clearly free from any settled mental disorder.

dence of both is in perfect consistency, and that evidence is confirmed by the solemn attestation of Mr. Ellaby himself, who procures and witnesses the signature of the testator to the instrument, not under any urgent pressure lest the sick man should die intestate if he hesitated, but for no more serious reason than that the testator might not direct prayers to be offered up for him in Constantinople after his death. It is plain, from this gentleman's conduct, that he could not at this time have entertained any doubts as to the testator's capacity, and it is but justice to him to observe that he tells us in his evidence that he did not entertain any.

He says: "I did not at the time think him to be at all of unsound mind;" and such doubts about it as he now entertains appear from a subsequent part of his evidence to be the result of what he has since heard, and the inquiries he has made. To such doubts no attention can, of course, be paid.

What passed after the execution of the will is of much less importance. Mr. Ellaby remained a considerable time after this with the testator, and had a long conversation with him, in which he says the testator expressed a belief in astrology and necromancy, and spoke of having told fortunes, and called up and seen a spirit, and other extravagant talk of the same description; but this was after the will had been executed; the arts in which he professed to believe were such as were once believed and professed by some of the most learned men in Europe, and are still believed and professed by many of the Eastern nations to which this gentleman was so strongly attached. If more weight could be attributed to particular expressions, separate from the context of the conversation, than we think can be properly given to them, we should consider them, under the circumstances, rather as the effect of that temporary delirium which is a frequent attendant in severe illness, and great weakness and exhaustion, than of settled mental disorder. From any delusions of this kind the testator is, in our judgment, clearly shown to have been free at the time when the will was executed.

What passed when the will of the 8th was prepared affords, as we have already observed, the most conclusive proof of the testator's capacity at that time. What passed when the will of the 11th was prepared we are unable to collect with much distinctness from Mr. Ellaby's testimony; we are unwilling to make any unnecessary remarks upon his evidence, particularly as the points to which we are about to advert were not the subject of observation at the Bar, and possibly some explanation might be offered which does not occur to us.

But it is plain that much must have passed of which no account is given by that gentleman, and he must be mistaken in some part of what he says did pass.

He states that the only instructions which he received for the new will before he prepared the draft, were the papers already written by Mr. Browne, junior: but on comparing these instruments it is clear that this cannot be so.

We have, in the Appendix, copies of these documents. The draft which he says he drew from the original instructions and read over to the testator, instead of being a draft will, is a collection of confused memoranda of different bequests jotted down upon several loose sheets of paper, which could not have been read over, in the form in which they stand, so as to be intelligible to anybody.

Again, the bequests, in the form in which they are there could not have been taken merely from the former will.

By that will, as we have already observed, the four railway shares are given absolutely to Sarah Gear; but by this draft and the subsequent will they are given in trust to her for life, free from the control of any husband whom she might marry.

We had at one time feared that in establishing the will now propounded, we should have defeated what was probably the real intention of the testator, by diminishing the benefit given to Sarah Gear; but on a closer examination of Mr. Browne's evidence, to which we have already adverted, we find that this limited bequest was what he really intended. Is it possible to have stronger evidence that this bequest was not taken from the alleged instructions, but procured from the testator himself, who had his real intentions thus carried into effect?

Again, in the draft and the will of the 11th we find these important words: "And inasmuch as many years ago I gave up my share of the property of my late father to my dear brother, Robert Hay Graham, M. D., who has since that time been in enjoyment of it, I do not therefore think it necessary to make him any bequest, except as hereinafter appears, seeing that he has already been largely benefited by me."

Now, of this fact there is not the slightest mention in the former will; nor does it appear even to have been communicated to Mr. Browne. It must therefore have been communicated by the testator to Mr. Ellaby verbally. It shows that much discussion must have taken place as to this will between him and the testator; it shows the testator's memory and judgment at the time, and yet not one syllable is found respecting it in Mr. Ellaby's deposition.

There are many other circumstances in this draft which show

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There appear
to be discre-
pancies and
deficiencies
in Mr. Ellaby's
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will were
evidently
taken from
the testator
himself, and
expressed his
full intentions.

that the particulars were taken not merely from what are called the written instructions, but from the testator himself.

In these instructions,—or, as we should rather call them, will, — two notes of the East India Company are disposed of, but without mentioning either their dates or numbers. In this draft and subsequent will both the dates and numbers are mentioned. Can it be doubted that the notes themselves were referred to and produced by the testator?

The same observation may be made with respect to the Indian brooch with nine gems, and the two Korans, of which there is no mention in the former will; and the introduction of the name of Nix instead of Gear, in describing the mother of Sarah Gear. This minute examination of the evidence satisfies us that the instrument now in question contains the clear, deliberate intentions of the testator expressed on the 8th, at a time when there is no question of his sanity, corrected in one particular, in which they had been mistaken, on the 11th, and on that day with this correction, and some additions confirmed by the testator, under circumstances which shew that he perfectly understood what he was doing, and again confirmed by him with respect to the only bequest open to any remark — the bequest of the residue on the 12th, and embodied in the will of that date. The evidence should be very conclusive indeed, which is to overturn such an instrument.

The evidence
must be very
conclusive
indeed to
overturn such
an instrument.

The case of
Waring v.
Waring, and
the doctrine
there laid
down, is not
applicable to
the present
case.

It is true that there may be cases of the class so elaborately discussed in the judgment, *Waring v. Waring* (a), in which a man may be clearly insane upon one particular subject, and one only, — in which a permanent delusion rooted in the mind, and irremovable in sickness or in health, may create unsoundness, and yet may not show itself in any of the ordinary transactions of life. In such cases the reasonableness of the will or the rational conduct of the individual who makes it may be no proof of sanity; but this is not a case of that description. The insanity attributed to the testator is a general derangement of the intellect, showing itself in wild and maniacal demeanour and incoherent and irrational language. That this gentleman's mind ultimately sank under his disorder, and was destroyed before life was extinct (as is not unfrequently the case) seems proved by the evidence of Dr. Marsden, who saw him on the 19th June, three days before he died; but the question is, what was his state on the 12th, and on this the *evidentia rei* is most important. It is completely confirmed by the evidence of Dr. Walshe, who saw him on the 11th, 12th, 13th, and 14th, — who

examined the state of his intellectual faculties, and states that they did not appear to be affected by his bodily ailments; that, on the contrary, they appeared to be clear above the average. He says that he did not from his examination detect the slightest evidence of any organic disease of the brain, acute or chronic; that in his opinion, the deceased, when he saw him, was of sound mind, memory, and understanding, and was capable of making his will, and of doing any other serious or rational act of that nature.

In this opinion, after much and anxious consideration, we are obliged to concur. We feel the utmost respect for the opinion from which we are compelled to differ; but the subject is one upon which, more than perhaps any other, different minds are likely to come to different conclusions on the same evidence; and we most humbly advise her Majesty to reverse the judgment complained of, and to admit the disputed instrument to probate.

Practically, perhaps, the result will not be very different from that which would have attended the establishment of the will of the 8th; for as we shall advise that the cost of all parties, both in the Court below and in this Court, should be paid out of the estate, it is to be feared that there will be very little residue left to provide for the objects either of the testator's vanity or of his benevolence.

Judgment of the Court below reversed, and the costs of all parties to be paid out of the estate.

Proctor for Mr. Austen, *Edwards*; for the next of kin, *Nicholl*.

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The will pronounced for, and the judgment of the Court below reversed.

Costs of all parties to be paid out of the estate.

TOOTH *against* BARROW, FALSELY CALLING HERSELF TOOTH.

ARCHES
COURT OF
CANTERBURY.

May 11.

THIS was a suit of nullity of marriage by reason of undue publication of banns. It was brought by virtue of letters of request from the commissary-general of the city and diocese of Canterbury, by Charles Tooth, of Cranbrook, in the county of Kent, and diocese of Canterbury, against Elizabeth Barrow, spinster, falsely calling herself Tooth, and pretending to be the wife of the said Charles Tooth.

The illegitimate daughter of a woman who had lost her original name and acquired another was married by banns published in her original name, not as being the daughter of such

The circumstances of the case were these. In the year 1847, Mr. Robert Tooth, a gentleman residing at Cranbrook, and the

mother, but of the mother's brother, who, at the marriage, also represented himself as her father,—*Held*, under the circumstances, which were surrounded with fraud, that the marriage was had without due publication of banns, and, both parties being cognizant thereof, was null and void.

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father of Charles Tooth, the party proceeding, articted his son, then sixteen years of age, to Mr. J. E. Wilson, of Cranbrook, a solicitor, and arranged for his residence in Mr. Wilson's house. Mr. Wilson was clerk to the guardians of the Cranbrook Union, and about the 15th or 16th of the month of March 1848, a young person named Elizabeth Barrow called at his office to make application for the situation of schoolmistress to the workhouse, which was then vacant. Mr. Charles Tooth saw her, appears to have been struck with her, followed her when she left the office, and made an appointment to meet her in the course of the same day. In a very short time she persuaded him to marry her, but he, well knowing he should be unable to obtain his father's consent, arranged with her to be married clandestinely, and immediately to take their departure for Australia. Accordingly, on the 8th of April following he ran away from Mr. Wilson's house, came to London, and for some days eluded the vigilance of the police, who had been employed by Mr. Wilson and Mr. Tooth to discover him. On the 14th of April, he was married by banns to Elizabeth Barrow, at the parish church of St. Olave, Southwark, and on the 17th was discovered by the police, was separated from her, and conveyed to the residence of his father, after which time he never saw her again; for on the 23rd of the same month his father sent him away to Sydney.

Subsequently circumstances came to the knowledge of Mr. Tooth's family which induced them to take steps towards his obtaining a divorce *a mensâ et thoro* from his wife; but in the course of the inquiries that were then instituted, certain facts transpired that led to the institution of the present suit for nullity, on the ground of undue publication of banns.

Elizabeth Barrow was the illegitimate daughter of a person named Sarah Tooth (not a relation of the party proceeding), who, when her daughter was about four years old, married a man named George Barrow. After their marriage Elizabeth constantly lived with them, and seems to have been always called and known by the name of Barrow, from the time she was five or six years old; so much so that it was generally supposed in Cranbrook that she was the legitimate daughter of George and Sarah Barrow.

A libel, consisting of nineteen articles, was given in on behalf of Mr. Charles Tooth. No appearance having been given for the wife, the proceedings were carried on *in pœnam*.

The above facts having been stated at length in the former articles, it was pleaded in the eleventh, —

That Charles Tooth became fondly attached to Elizabeth

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Barrow, who induced and prevailed upon him to agree to be married to her; whereupon it was arranged between him and the said E. B. to procure the publication of banns of marriage between himself and her in the parish church of St. Olave, in the borough of Southwark; and as the said C. T. well knew, and represented to the said E. B., that his father would not consent to their said intended marriage, it was at the same time *knowingly and wilfully arranged between them, with a view to effectual concealment*, that the said E. B. should, in the said banns, be described by the names of Elizabeth Tooth, and not by her names of use and reputation. That the said E. B., with the privity of the said C. T., thereupon communicated the said arrangement to Sarah Dungey, and told her that as the family of the said C. T. had friends residing in the parish of St. Olave, the names of Elizabeth Tooth would be less likely to attract their attention than the names of Elizabeth Barrow, as they would be considered those of a relation; and thereupon requested her to procure the publication of banns of marriage in the names of Charles Tooth and Elizabeth Tooth in the said church. *That* the said Sarah Dungey accordingly proceeded to the said church, and procured the publication of such banns; *that*, such banns were published accordingly in the said church on Sunday, the 26th of March, and the next two following Sundays.

The twelfth article pleaded, *That*, in pursuance of the banns of marriage, so unduly published, a pretended marriage was in fact solemnized on the 14th of April 1848, in the said church, between the said Charles Tooth and Elizabeth Barrow, and *that* an entry thereof was made in the register-book, under the names, and by the description, of Charles Tooth, bachelor, son of Robert Tooth, merchant, and *Elizabeth Tooth, spinster, daughter of Edward Tooth*, shoemaker, and both as of full age, and as residing at No. 168. Tooley Street, in the said parish. *That*, on such occasion, Elizabeth Barrow, in the presence and with the knowledge of the said Charles Tooth, subscribed to the said entry of marriage, the names of Elizabeth Tooth; *that*, on such occasion, the said E. Barrow was accompanied by Edward Tooth, the brother of the said Sarah Barrow; *that* the said Edward Tooth, by previous agreement with the said E. Barrow and the said C. Tooth, falsely represented himself as her father, and in such character subscribed his name to the said entry of marriage; *that* the said Edward Tooth never had a daughter; *that* the said marriage was solemnized without any license having been obtained, and *that* therefore the marriage, so knowingly and wilfully had, without due publication of banns,

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 {
 TOOTH
 against
 BARROW.

was and is null and void to all intents and purposes in the law whatsoever, &c.

Upon this libel, nineteen witnesses were examined (a), who fully proved its contents.

Dr. *Twiss* and Dr. *Spinks* appeared for Mr. Charles Tooth; but,

Judgment.

SIR JOHN DODSON said,—I do not think I need trouble you to argue the case. As the proceedings have been carried on *in pœnam*, I considered it my duty more narrowly to watch the case, and when I admitted the libel, I did so conditionally, and reserved my decision as to the effect of the circumstances pleaded until I saw the evidence to prove them. I have now read that evidence, and I think it clearly proved that this young girl was universally known by the name of Elizabeth Barrow, and that, in fact, no one in Cranbrook knew her at all by the name of Tooth. It is also clearly proved that both the parties were cognizant of the fact that the banns were not published in the name of Barrow, but in the name of Tooth, and yet knowingly and wilfully intermarried.

When I admitted the libel I entertained some doubt whether, in the case of an illegitimate child, the publication of the banns in the name of its mother, instead of the name of notoriety and repute, would necessarily be such an undue publication as would nullify the marriage. No doubt the name which a person under such circumstances has fully acquired, is that in which the publication of banns should take place; but I apprehend there might be a case in which, without any fraudulent intent, and from an innocent misapprehension of what was correct, the name of the mother might be used instead of that subsequently acquired, and under such circumstances the Court might hesitate to pronounce the marriage a nullity.

The evidence, however, in this case, has removed any difficulty which the Court might otherwise have felt. The witness, Sarah Dungey, clearly proves that the publication of the banns in the name of Tooth was made with a fraudulent intent, and not by innocent mistake; and that it was in fact the assumption by Elizabeth Barrow of the name of Tooth, as the pretended daughter of Edward Tooth, and not the resumption of the name as the illegitimate daughter of Sarah Tooth. In her deposition on the 11th article she says: "The said Elizabeth Barrow thereupon gave me a paper with the names of the said Mr. Charles Tooth and herself written on it for the purpose of my getting such banns published, and the name of the church

(a) The whole of the evidence in Cranbrook and Tunbridge Wells, under a commission from the Court, this case was taken within five days at

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where they were to be so published was written upon the said paper as well. As soon as she gave me the said paper I perceived that she had written her name upon it as Elizabeth *Tooth*, and I thereupon said to her, 'What! is your name Tooth? I always understood your name was Barrow.' And she replied, 'Oh, no; my proper name is Tooth.' The witness then goes on to say, "I had always heard the said Elizabeth Barrow called and spoken of by the name of Barrow, and never by the name of Tooth; and so when she told me that her proper name was Tooth, I looked very much puzzled, and she therefore added, "Mr. Edward Tooth of Tunbridge is my father; he is in good circumstances; if we can but accomplish our marriage, he will do something for me." Such is Sarah Dungey's evidence upon the point, and there is nothing whatever to discredit her. She is, moreover, fully corroborated by the fact that on the occasion of the marriage Mr. Edward Tooth was present, and represented himself as the father of Elizabeth Barrow.

Looking, therefore, at the whole of the circumstances of this case, I am of opinion, that the parties knowingly and wilfully intermarried without such a publication of the banns as the law requires, and that consequently the marriage is null and void.

Proctor for Mr. Charles Tooth, *Tebbs*.

THE "ARGO," *Stenman*.

THIS vessel, belonging to a Russian owner, and sailing under Russian colours, bound on a voyage from Havannah and Matanzas to Cork, for orders, was captured on the 6th of May last off Cork Harbour, by her Majesty's revenue cruizer "Eliza."

By permission of the Lords of the Admiralty, she subsequently proceeded from Cork to Liverpool, where she discharged her cargo.

A claim was made by Mr. Henry Sharpe, of 26. Broad Street Buildings, London, merchant, on behalf of Gustaf Bergborn, of Uleaborg, in the Grand Duchy of Finland, the sole owner of the vessel. This claim was ordered to be amended; and Mr. Sharpe made a further affidavit, "That he is advised and believes that the ship 'Argo,' although the property of a Russian subject, was at the time, and under the circumstances of her seizure by her Majesty's revenue cutter 'Eliza,' on the 5th day of May last, within the protection of her Majesty's Order

ADMIRALTY PRIZE COURT.

Aug. 4. & 15.

The Order in Council of 29th March 1853 exempts from capture Russian vessels which, prior to the 29th of March, shall have sailed from any foreign port bound for any port in her Majesty's dominions.

A vessel under a charter-party for a voyage from Havannah or Matanzas to Cork, sailed from Havannah in ballast

prior to such date, took in her cargo at Matanzas, and sailed thence subsequent thereto.—*Held*, that it was a continuous voyage; that it commenced at Havannah, where the charter-party was entered into, and that the ship must be restored under the Order in Council.

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 THE
 "Anno."

in Council (issued expressly for the purpose of lessening the evils of war) of the 29th of March last, exempting from capture or detention Russian vessels under special circumstances, and as so being, ought to be restored to her Russian owner."

The special circumstances are stated in the judgment.

The Queen's Advocate and the *Admiralty Advocate*, appeared for the captor.

Dr. Addams and Dr. Twiss, for the claimant.

Aug. 15.
 Judgment.

DR. LUSHINGTON. This is a Russian vessel, captured on May 6th. She left Cuba on April 2nd, with a cargo belonging to Kirkland and Company, Glasgow, she reached Queenstown on May 6th, and was there seized by a revenue cutter. The cargo was restored, and a claim is now made for the ship and freight. The ship, being enemy's property, must be condemned unless she is protected by some act of the British Government; and it is alleged that she is so protected by the Order in Council of March 29th.

With regard to the construction of that Order, I have already stated in a former case the principles which will guide my judgment (a), and to which I intend to adhere till better informed by a higher tribunal.

Documents relaxing belligerent rights should receive as liberal a construction as is consistent with the terms thereof.

I am of opinion that all relaxation of belligerent rights emanating from the Government of this country, and declared in authentic documents, should receive a liberal construction—as liberal a construction as the terms of those documents will admit of; but in so doing I must be governed and restricted by the words which are used, and abstain from giving an interpretation which cannot be borne out by the instrument to be construed.

Special circumstances of this case.

First, then, what are the facts of the case? In the month of February this vessel was lying in the port of Havannah, whence she had come from the port of Antwerp, with a cargo landed at Havannah; whilst at Havannah she took in ballast, then sailed for Matanzas, and there shipped her cargo. Matanzas was the last clearing port, and she left it on April 2nd. According to the evidence of the master, on the 9th interrogatory the cargo was begun to be put on board on February 28th, and completed on March 30th.

She sailed under a charter-party dated Feb. 7. at Havannah.

This vessel sailed under a charter-party bearing date February the 7th, at the Havannah, and by the charter-party it was stipulated that the vessel should load at Havannah *and or* (b) Matanzas; forty-two running days were to be allowed; at the end of which demurrage was to be paid. Should the vessel be

(a) "*The Phoenix*," *anté*, p. 309.

(b) In the charter-party it was so expressed: "and — or Matanzas."

ordered to Matanzas, sufficient cargo or ballast should be given at Havannah to keep her safe.

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THE
"ARGO."

Judgment.

The contract was entered into and its fulfilment was commenced at Havannah.

I must here observe that the contract, beyond all doubt, was made at the Havannah, and, as I understand it, the charterers had the option to load at the Havannah or at Matanzas, or partly at one or partly at the other; and not only was the contract entered into at the Havannah, but began to be executed there, first, by taking in the ballast as mentioned in the charter-party, and secondly, by the running of the lay days as appears by the indorsement of the charter-party itself.

Such being the facts, I now turn to the Order in Council. It has been contended that this vessel ought to be released within the terms of the first part of the Order, which directs that Russian vessels within her Majesty's dominions shall be allowed till May 10th for loading and departing. Now this vessel, at the date of that Order, was clearly not within her Majesty's dominions, and in my judgment was neither within the words nor the spirit of the first part of this Order.

Clearly not within the exemption of the first part of the Order in Council.

The next branch of this Order directs that any Russian merchant vessel, which prior to this Order shall have sailed from any foreign port, bound for any port or place in the Queen's dominions shall be permitted to enter and depart without molestation. This vessel did sail from the Havannah prior to the date of the Order; she sailed from Matanzas subsequently to the date of the Order. When she left Havannah she was in ballast, bound for Cork, according to the charter-party.

But this vessel having sailed from Havannah on her voyage to England prior to the date of that Order, is protected by the latter part of it.

It has been contended that this Order in Council contemplated that the Russian vessel should have been laden at the date of the Order; but I find no words in the Order that would justify my putting so strict a construction upon it; neither do I think that there are any words which impose the necessity of not touching at or taking a cargo at some other port than that where the voyage commenced. For instance, I apprehend that a vessel might have taken in a part of her cargo from one foreign port, having left that port prior to the 29th of March, and taken in another part of the cargo at another foreign port subsequently.

The real meaning of the Order in Council, according to my view of it, is, that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah, and that the sailing from the Havannah prior to March the 29th, is a substantial compliance with the terms of the Order. I must therefore restore this vessel.

Ship restored.

Proctors: for the seizer, the *Admiralty Proctor*; for the claimant, *Rothery*.

1854.

THE HIGH
COURT OF
ADMIRALTY.

May 30.

A steamer in charge of a duly licensed pilot proceeding up the river caused such a swell that a barge, laden with coals, was thereby sunk.—*Held*, that the steamer was to blame, for she ought to have seen the swell and the barge, and to have stopped in time to avoid the accident; and that, though the pilot was to blame for not checking or stopping the steamer, yet that the owners were liable, because it appeared in evidence that neither the swell nor the barge was seen from the steamer, and that, therefore, there was not a good look-out.

Pleadings.

THE "BATAVIER."

THIS was a cause promoted by the owner of the barge "Ann," against the Netherlands Steam-ship Company, the owners of the steamer "Batavier," for damage caused by the sinking of the barge with a cargo of forty-nine tons of coals, on the afternoon of the 5th of October last.

The libel on behalf of the "Ann," pleaded, in effect, *that* after having taken her cargo on board from a collier brig moored off Wapping, she cast off from and quitted the said collier on her return to Long Ditton, in the county of Surrey, at about half-past three p. m. of the 5th of October, at which time it was nearly high water, and the tide was flowing. *That* the barge was navigated with her head to the tide, and was floating with the tide up the river stern foremost, in charge of Thomas Gildon and George Lee. *That* a few minutes after she had quitted the collier the steamship "Batavier," passed her at the distance of about fifty yards, proceeding with tide and steam at the rate of nine or ten miles in an hour, the pool at such time being clear. *That* from the great rate at which the steamer was proceeding, her paddle wheels caused the river to rise and swell so much, that in consequence thereof the water flowed entirely over, and filled the barge "Ann," which thereby immediately sank and went down. *That* by the rules and bye-laws made by the Court of Mayor and Aldermen of the City of London, in pursuance of an Act of Parliament passed in the 7th & 8th years of the reign of his late Majesty George 4., intituled "An Act for the better Regulation of the Watermen and Lightermen on the River Thames, between Yantlet Creek and Windsor," it is provided, "That no steam-boat or vessel of 200 tons burthen or upwards, registered tonnage, shall be navigated upon the River Thames, westward of St. George's Stairs, Deptford, at a greater speed than at the rate of six miles in an hour with the tide, nor more than four miles in an hour against the tide;" *that* the "Batavier" is of the burthen of 227 tons registered tonnage, and her engines of 140 horse power; *that* previously to and at the time of her passing and sinking the barge "Ann," by the swell of the water caused by her paddle-wheels, she was being navigated at the rate of nine or ten miles in an hour; *that* the sinking of the barge "Ann," and the damage consequent thereon are imputable solely to the master and crew of the "Batavier," to wit, from the dangerous and illegal speed at which she was then being navigated, and, *that* the same were not caused by or attributable in

any manner to any misconduct or unskilfulness on the part of those on board the barge, &c.

An allegation given in on behalf of the "Batavier," pleaded in effect, *that* the "Batavier," in the prosecution of her voyage from Rotterdam to London, with a general cargo and passengers, arrived at Gravesend shortly after noon on the 5th of October, when and where the charge and command of her was given up by the master to a pilot, duly licensed by the corporation of the Trinity House, to take charge of vessels of all burthens from Gravesend to London. *That* the said pilot continued in such the charge and command of her from such time, until her arrival, at her moorings, off St. Katharine's Docks, at about half-past three p.m., and, *that* all his orders and directions for the navigation and management of the vessel whilst so under his charge were promptly and implicitly obeyed and carried into effect by her master and crew. *That* the said pilot, on the arrival of the "Batavier" off Greenwich, slackened her speed to five knots an hour, and thence gradually to three knots an hour, in order that she should not arrive at her moorings before the turn of the tide, and so to avoid the necessity of swinging her with the tide. *That* the "Batavier" passed the Stone Stairs, Wapping, at a speed of three knots an hour only, or thereabouts; *that* the pilot, master, and crew were stationed, &c.; *that* the "Batavier," in passing the Stone Stairs, so little disturbed the smoothness of the water that a common wherry put off from the said stairs, and pulled alongside and spoke her as she passed; *that* neither the barge "Ann," nor any other barge, was then being navigated with her head to the tide (or being floated with the tide) up the river stern foremost or otherwise within (at least) five times the distance of fifty yards from or at all within sight of the said steam-ship. *That* several steam-ships passed the Stone Stairs, going up and down the river, between the time when the "Batavier" passed those stairs, and that at which the barge "Ann" was sunk opposite thereto. *That* the sinking of the barge and the damage consequent thereon were occasioned either by the mismanagement of those in charge of the barge, or by the swell produced by some one or more steam-vessel or steam-vessels passing the barge at the time other than and divers from the said steam-ship "Batavier." *That* at the time of the sinking of the "Ann," the "Batavier" was in charge of, and was being navigated by, a duly licensed pilot, all whose orders and directions in respect whereof were duly and promptly obeyed and carried into effect; *that* it is to the want of care or skill of the said duly licensed pilot, that the sinking of the said barge "Ann," and the consequent damage, must be imputed, if,

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"BATAVIER."
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THE
"BATAVIER."

notwithstanding the premises, it is held that they are imputable at all to the said steam-ship "Batavier," or to any one on board her, &c.

The Queen's Advocate and Dr. Jenner appeared for the owner of the "Ann"; Dr. Addams and Dr. Twiss for the "Batavier."

Summing-up.

DR. LUSHINGTON, addressing the Trinity Masters (a):—
Gentlemen, before I proceed to address you on the particular facts of this case, I am desirous to dispose of much of the discussion which has taken place at the Bar with respect to certain particular circumstances.

In the course of the argument much has been said respecting the discrepancy between the evidence of the witnesses as to the time the steamer, the vessel proceeded against, arrived at the docks, and as to the rate of her steaming. The discrepancy as to the latter has certainly been great, indeed, for it varies from ten or eleven knots an hour to one knot and a half. With regard to the former, we have it positively averred by the mate of the steamer, that the hour of arrival at the docks was four o'clock; whereas it is sworn by the pilot who conducted her, that she was in at three o'clock. Again, we have other evidence, stating that the steamers that passed by shortly before this vessel came up, were two Margate vessels; and we have another witness who swears that they were not Margate vessels, but two foreign seagoing vessels.

Discrepancy in evidence is not necessarily a ground for the imputation of perjury, which is always to be avoided if possible.

Now, gentlemen, all persons who are accustomed to sift the evidence of facts and circumstances, know that great variations constantly take place; but that is no reason why we should impute perjury to the witnesses. The great object in view is, if possible, to come to such a decision as shall be consistent with the evidence, without attributing perjury to the one side or the other. We are not hastily to impute perjury, or to discard the testimony of witnesses, on account of the great variations in their testimony.

Affirmative evidence is entitled to greater weight than negative.

Again, it often happens that both affirmative and negative evidence is produced; some witnesses saying they clearly saw a certain thing, others saying they did not see it. I will here observe, that when comparing one set of witnesses with the other, the affirmative witnesses, in my opinion, are those to whom greater credit is due, than the negative witnesses, because it is quite possible the latter may not have seen it. A man not on the look-out may not see what another man who is looking out may see; and though he swears he does not see it, it does not

(a) Captain Weller and Captain Redman.

follow that his evidence is not correct, or that it is in opposition to one who saw the transaction with his own eyes.

Having mentioned these circumstances, we now come to the facts of the case, and we will proceed step by step, first taking the uncontested facts, and then adverting to the contested ones.

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Summing-up.

The uncontested facts of the case.

The uncontested facts are, — that the accident occurred on the 5th of October, during daylight; that the barge had just taken on board a cargo of coals from Coal Stairs, improperly pleaded Stone Stairs (but as nothing turns upon that, we will dismiss it from our consideration in this case), and that just as the tide was within a quarter of an hour from ceasing to flow, she quitted the ship, and proceeded up the river towards the place of her destination. Now, we must recollect that the river at the particular place where the occurrence in question happened, is exceedingly narrow. You will, therefore, have to consider whether or not any blame was attachable to the barge at all for casting off from the ship as she did. You have evidence to show that the barge would carry fifty-six or sixty-three tons, and she had only forty-nine on board. You will say, therefore, whether you are of opinion that it was improper for her to have quitted it, and in such a state of the tide. With regard to the fact of her having fastened to another vessel, you have heard the evidence stated by the counsel on behalf of the "Batavier," and you will have the kindness not to overlook it in the opinion which you give me. The next fact in the case, which is perfectly indisputable, is, that the barge sank. The question is, to what cause are we to attribute that sinking? I apprehend there can be no doubt whatever that we must attribute it to the swell that took place in the river at the time; whether such swell was caused by the two steamers that previously passed, or was occasioned by the "Batavier" coming up, or by the conjoint swell arising from the two steamers and the "Batavier," are matters which must be determined by yourselves in conjunction with me, on the present occasion. Another question which I shall have to put to you will be, whether you are of opinion that such swell was caused by the "Batavier," augmenting the swell previously occasioned by the two steamers. In considering that question, there are certain facts in the case which must be brought to your attention.

It is not the rate of sailing alone that causes the swell made by a steamer; it is also caused by the peculiar form of the vessel, and the manner in which she steers upon the occasion. In respect to the "Batavier," we have it in evidence, that she is a vessel of a peculiar kind; she is an old Dutch vessel. The

The "Batavier" was a vessel of peculiar build, and may have produced a greater swell

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THE
"BATAVIER."

Steaming-up.

than one of
the ordinary
build.

The question is not as to the rate of steaming allowed by the city regulations, but whether the "Batavier" was proceeding at a rate compatible with the safety of other vessels.

If likely to cause danger, a steamer is bound, not merely to slower, but to stop altogether.

An important question is, was there a good look-out on board the steamer?

words of one witness are these: "She is a remarkable boat, built like no other; she is a straight-sheered boat; she is a Dutch vessel." It may be,—I give no opinion upon it,—that a greater swell would be occasioned by a boat of this formation than would be made by another vessel of a different construction. If that be so, we shall then have to inquire whether the "Batavier" was to blame; whether she might or ought to have seen the swell, and have stopped and missed the barge, whatever was her rate of steaming.

With regard to her rate of steaming, I agree with the observation of counsel, that we have not to determine, on the present occasion, what was the precise rate of steaming; because, assuming it to be, that the city regulations do not allow vessels to go at more than six miles an hour, that is simply a prohibition that a vessel, under any circumstances, shall not exceed that rate; but we shall have to determine whether, under the circumstances, she was going at a rate which, considering the place she was in, was compatible with safety to other vessels which she was likely to meet. The question is, whether she ought to have gone at any rate at all.

A steamer going at a slow rate, even at one knot and a half an hour, if she sees anything in her way which, if she prosecutes her voyage without stopping, she will be likely to destroy or to put life in danger, is bound, not merely to diminish her rate of steaming, but to stop altogether.

This being so, another question arises that is of very considerable importance, and perhaps the very greatest, in my view of the case, though it has not been argued; that is, whether there was a good look-out on board this vessel; because if there was a good look-out, on board the steamer, the next question is, whether the look-out ought not to have seen the barge,—ought not to have seen the swell, and to have given notice to the pilot that there was such a swell, and such a barge, and that to proceed on the voyage without taking measures to avoid coming into contact with the barge, or to avoid increasing the swell, would be dangerous.

Now, how does the question stand with respect to the look-out? It stands in a very peculiar position on the present occasion. There are three witnesses examined from on board the "Batavier" who might have given evidence on the subject; William Smith, the master, John Webb, the waterman, and Maartin Van t'Hoff, the mate. These were all persons whose duty it was to keep or assist in keeping a good look-out; but not one of them, according to their own statement, saw the barge at all. Now, if the barge was visible, why did they not see it?

I shall not advert to the evidence of the sea-pilot, it was not his duty to have kept a look-out, therefore there can be no omission ascribable to him whatsoever, because he had no duty to perform in the vessel. I shall also forbear from referring you to the evidence of the engineer, because he could not see; so also with respect to the evidence of Visser and Pieter Van t'Hoff; it was their duty to attend the wheel; it was not their duty to keep a look-out; but it was sworn, in the evidence of the mate, that there was a look-out, and that such look-out was kept by the boatswain and two persons in the ship. Neither of these persons nor the boatswain have been examined on the present occasion. It appears to me to be an important consideration for you to determine whether there was a proper look-out; and if a proper look-out had been kept, whether the swell, if any, must not have been perceived; and as all the facts show that the barge was there, whether notice should not have been given to the pilot, so that the pilot might adopt proper measures to avoid accident.

With regard to the pilot, it is alleged on behalf of the owners of the "Batavier," that the vessel being in his charge, it was his duty to take care that she went at a proper rate; it was his duty to navigate the vessel. It is said that his orders were strictly obeyed, consequently, that under the provisions of the Act of Parliament, the owners are relieved from all responsibility. Now, I entertain no doubt that if the pilot was alone to blame, the owners are not liable, because the words of the Act of Parliament are, that they shall not be liable where there is a duly licensed pilot in charge of the vessel within his proper ground. I am also inclined to think, subject to your better judgment, that this is not a case where the master ought to interfere with the orders of the pilot. There are many cases in which I should hold that, notwithstanding the pilot has charge, it is the duty of the master to prevent accident, and not to abandon the vessel entirely to the pilot: but that there are certain duties he has to discharge (notwithstanding there is a pilot on board) for the benefit of the owners.

But with regard to the rate at which the vessel was going, it appears to me that the pilot would be the only person to blame; if, however, there was a want of good look-out, and the accident occurred in consequence of notice not being given to the pilot, it is a defect of the crew of the vessel.

Now, these are the questions I intend to put to you. The learned counsel on behalf of the "Batavier" has requested me to put another question, which I will do. I am very desirous, that on all these occasions the parties may be satisfied that jus-

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"BATAVIER."*Summing-up.*

It is not the duty of the sea-pilot to keep a look-out.

Those whose duty it was to keep a look-out have not been examined.

The vessel was in charge of a pilot whose duty it was to navigate her.

If he were alone to blame, the owners would not be liable.

In some cases the master is, but in this was not, bound to interfere with the pilot.

But the crew may be to blame for not having given due notice to the pilot.

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tice has been done, and put every question counsel may suggest. The question is in these words, "The barge was with her head to the tide, stern foremost, the water smooth;"—this is on the supposition that the evidence of the first witness is correct,— "had the 'Batavier' passed at too great a speed under these circumstances, would the water have rolled over her head and not her stern? would the next swell have put the barge's head right under water? and would the barge have gone down head foremost?"

After consultation with the Trinity Masters,

Judgment.

DR. LUSHINGTON said: We all concur in the opinion which I am now about to state. As to the first question, we think that the barge was sunk without any fault or defect attributable to her. We have taken into consideration what was urged by counsel as to the evidence of one of the witnesses. As to the second question, whether, the swell which sank the barge was attributable to the swell of the "Batavier," or the two steamers, we think it was caused by the "Batavier." Thirdly, the "Batavier" was to blame, for she might and ought to have seen the swell and the barge, and ought to have stopped in time to avoid the accident. This was her duty, however slow her actual rate of sailing might have been. Fourthly, we think that the pilot is to blame for not checking the speed or stopping the steamer; and he is solely to blame in that respect. Fifthly, we think there was not a good look-out on board this vessel; for it appears from the evidence that neither the swell nor the barge was seen from the "Batavier." We are of opinion that if there had been a good look-out, the barge and the swell must have been seen. Then, with respect to the question proposed by Dr. Addams, which I put to the Trinity Masters in the words given to me, their answer is,—a subject on which I myself can give no opinion,—that the sinking of the barge would most probably take place in the manner it is stated to have done in the evidence. The consequence is, I pronounce against the "Batavier." (a)

Proctors: for the "Ann," *Nicholl*; for the "Batavier," *F. Clarkson*.

(a) This decision was affirmed by the Privy Council.

WESTERTON *against* DAVIDSON.

THIS was an application by Mr. Charles Westerton to be admitted one of the churchwardens of the district chapelry of St. Paul's, Brompton; and was opposed by Mr. Thomas Davidson.

An act on petition was given in by Mr. Davidson, alleging *that* a meeting of the resident householders of the district was held on the 18th of April last, for the purpose of electing churchwardens, over which the Hon. and Rev. R. Liddell presided; *that* Mr. Horne having been nominated and appointed as one of the churchwardens by the said Mr. Liddell, Mr. Westerton and Mr. Davidson were then proposed respectively by certain resident householders; *that* a show of hands was taken to determine which of the said gentlemen should be the second churchwarden, but *that*, by reason of the crowded state of the room, the chairman was unable to decide in whose favour there was a majority; *that*, in consequence thereof, a poll was demanded, and it was mutually agreed between the parties that it should be taken immediately, but *that* no hour was fixed for the closing thereof. *That* the chairman entered the votes, and inadvertently recorded the votes of some persons who were not qualified to vote by reason of their not at such time being resident householders; *that* the poll was closed at seven o'clock p.m. of the said day, at which time there were several duly qualified voters in the room, who were desirous of voting, and demanded to have their votes received, but *that* the chairman refused the same, and thereupon dissolved the meeting. The act then prayed *that* the election might be declared null and void, and a new election appointed.

The answer in behalf of Mr. Westerton alleged, *that* the objections contained in the act on petition were vexatious and irrelevant, and all of them utterly without foundation in law; *that* the chairman did not himself declare the result of the show of hands, but *that* the vestry, without protest from him, decided that it was largely in favour of Mr. Westerton; *that* no poll could be demanded until the show of hands was declared; and *that* consequently, the poll which followed was illegal. It then prayed that Mr. Westerton might be admitted at once to the office of churchwarden.

The case was heard in the dining-room of the Hall in Doctors' Commons. At the hearing Mr. Westerton did not appear either personally or by counsel.

Dr. Deane appeared for Mr. Davidson, and said, it appeared

1854.

ARCH-
DEACONRY
COURT OF
MIDDLESEX.

May 30.

Election of churchwarden. After a show of hands a poll was demanded, which by mutual agreement was commenced immediately. The chairman agreed with one of the candidates that the poll should close at seven o'clock, which was accordingly done, and thereby some qualified electors were prevented from recording their votes. Election void.

Pleading.

Argument.

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Argument.

that three persons had voted who were not qualified. That was an irregularity. But the ground on which he relied for setting aside the election was, that the poll had been closed at seven o'clock, when there were several resident householders who demanded, but were not allowed, to exercise their right of voting. Mr. Westerton rested his case upon the alleged fact that he had been duly elected by a show of hands.

The chairman had no right to close the poll when there was any one ready to vote. This was the doctrine laid down in *Rex v. The Rector, Churchwardens, and Parishioners of St. Mary, Lambeth*. (a) In the case of *Baker v. Wood* (b), Sir Herbert Jenner *Fust* decided that a chairman was not bound to declare on which side a show of hands was. Lord *Stowell* came to the same conclusion in *Anthony v. Seager*. (c) He therefore prayed the Court to declare the election void, and to condemn Mr. Westerton in the costs of the proceedings.

Judgment.

DR. R. PHILLIMORE, *Official of the Archdeacon.*

This is a proceeding relating to the election of the churchwardens of the district chapelry of St. Paul, Wilton Place.

It appears that at the visitation of the Official of the Archdeaconry of Middlesex, Mr. J. T. Horne and Mr. Charles Westerton appeared and presented themselves as churchwardens duly elected for the present year, and prayed to be admitted accordingly; but as a caveat on behalf of a parishioner had been entered against their admission, the Court assigned the party entering the caveat to set forth his reasons for objecting to their admission in an act on petition. That has been replied to by Mr. Westerton, who has appeared before the Court in person, but who does not appear or offer any opposition to-day.

Three questions arise upon the state of facts disclosed by the statement of the two parties. The first is a question as to the jurisdiction of the Court and its competency to entertain the objections which have been offered to the admissibility of the churchwardens. The second is a question as to the facts which are proved by the evidence and the pleadings. The third is a question of the law applicable to such facts.

First, with respect to the jurisdiction of this Court, I have to observe that both parties have appeared and joined issue before the Court, and that no *mandamus* has been applied for; perhaps I might further add that a careful review of all the cases on this subject and of the principle of law involved in them, leads me to doubt whether, if it had been applied for, it would

(a) 8 Ad. & E. 356.

(b) 1 Curt. 507.

(c) 1 Hag. Cons. 10.

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Judgment.

have been granted ; for as I had occasion to observe in a former case (a) of a like nature in the Court of the Archdeaconry of London, whatever language some of the earlier cases at Common Law may speak, there is the high authority of Lord *Stowell*, in *Anthony v. Seager* (b), in favour of the jurisdiction of the Court. Lord *Stowell* says, "Though it is the duty of the ordinary not to take slight objections, he is bound, I conceive, to take care that an election, in his opinion void in itself, should have no legal effect ; and this is a duty which he owes to the parish and to the general law of the country." The authority of this case has been fully recognized by eminent Judges at Common Law, in the case of *Campbell v. Maund* (c) ; and in that of *Rex v. Williams* (d), in 1828, it was laid down by the Court of Queen's Bench that the commissary might inquire whether the party has been duly elected, otherwise he might be bound to admit any person who presents himself for admission, even if he knows the fact to be that such person was never elected.

I find, moreover, that the records of this Court prove that both Sir *John Nicholl*, and others of my predecessors in this officialty, have heard and decided cases of this description.

The second question is with respect to the facts of the case. It appears that a meeting of the resident householders of the district was duly convened by a notice duly published on the 8th of April in this year ; that on the 18th of the same month a meeting was held in pursuance of such notice ; that the incumbent appointed Mr. Horne as his churchwarden for the ensuing year ; that afterwards two resident householders proposed Mr. Westerton for re-election, he having been the churchwarden chosen by the parishioners for the past year ; that two others proposed Mr. Davidson for re-election, he having been the churchwarden appointed by the incumbent for the past year ; that a show of hands was taken, and (as alleged by Mr. Davidson) the incumbent, who was in the chair, was unable, owing to the crowd in the room, to determine in whose favour the majority of hands was held up ; but, as alleged by Mr. Westerton, that majority was largely in his favour. This is, however, a matter of no consequence, for a poll was demanded, and of course granted, because it could not have been legally refused, and the polling was immediately proceeded with.

It is further alleged by Mr. Davidson, and it is not denied by Mr. Westerton, that an agreement was made between the in-

(a) *Story v. Colk*, 6 Notes of Cas.

33.

(b) 1 Hag. Cons. Rep. 10.

(c) 5 Ad. & E. 865.

(d) 8 B. & C. 681.

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Judgment.

cumbent and Mr. Westerton, during the course of the poll, that the same should be closed at seven o'clock on that evening. Now, I am clearly of opinion that no agreement between the incumbent and Mr. Westerton, even if confirmed by the majority of the electors present, could have legally so narrowed the period of voting as to exclude any qualified elector from a fair and reasonable opportunity of recording his vote. That seems to me to be the law clearly laid down by the Temporal and Ecclesiastical Courts; for instance, in the cases of *Rex v. The Commissary of the Bishop of Winchester* (a), and *Baker and Downing against Wood* (b), — a case referred to by Dr. Deane.

This doctrine of the law is very important with reference to the next averment in the statements which I have to notice. It is distinctly stated by Mr. Davidson, and not denied by Mr. Westerton, that "there were several resident householders present who had not voted at the said election, but who, being properly qualified, and desirous of voting, demanded permission to record their votes, which was refused by the incumbent." This is proved by the oath of Mr. Davidson, and is not denied by Mr. Westerton, in the reply which he has given in, and to which he has affixed his signature. In that reply he traverses no material fact alleged on the other side; but he says that "the objections are irrelevant, and void in law." It is quite competent to him to do so; the question is, whether his view of the law is correct.

To this state of things, the language of the Court of Queen's Bench, in the case of *Rex v. Churchwardens and Parishioners of St. Mary, Lambeth* (c), seems directly applicable, and confirms the doctrine of the other cases which I have just mentioned. "There is no doubt," said Lord Denman, "of the law, that the ratepayers in vestry are to elect, and that if a poll be demanded, it should be kept open for all qualified persons. If any single person had been excluded in the present case, it might have been occasion for demanding that the election should be set aside; but I do not find by the affidavits that any person who would have voted was shut out; and if so, nothing has been done to render the case different from what it would have been if the election had been decided at once. If it had appeared that any one person had been excluded it might reasonably be inferred that the resolution had affected the result of the election."

Now, in the present case, it is an admitted fact that the majority of Mr. Westerton was only *three*, — a fact which certainly

(a) 7 East. 573.

(b) 1 Curt. 508.

(c) 8 Ad. & E. 356.

does not make the observations of Lord *Denman* the less applicable.

I think it unnecessary to notice any of the other averments. It is clear to me that it was not competent to the incumbent, with or without the consent of Mr. Westerton, to deprive the electors of their right to vote at the poll; and I must direct the parish to proceed to another election as soon as may be after regular notice, which was the course pursued by Lord *Stowell* in the case of *Anthony v. Seager*.

I have been pressed by the learned counsel for Mr. Davidson to condemn Mr. Westerton in the costs of this proceeding. A similar application was made to Lord *Stowell*, in the case I have just mentioned: he refused it, and I shall certainly not accompany my sentence by any such order, because I think it clear that this misfortune, for such I must consider this kind of parochial dispute, is in a great measure owing to the incumbent's misapprehension of his duty as a chairman. He had no authority to enter into any agreement with Mr. Westerton, whereby the electors were to be deprived of their right to record their votes. He ought not to have excluded them, and his conduct in doing so has led to this suit.

Proctors for Mr. Davidson: *Shepherd, Bedford, & Middleton*.

1854.
WESTERTON
against
DAVIDSON.
Judgment.

G——S, FALSELY CALLED T——E, against T——E.

THIS was a cause of nullity of marriage by reason of impotence, promoted by the wife against the husband.

They were married upon the 29th of June 1852, and finally separated upon the 29th of September following.

The libel given in on behalf of the wife, after the usual plea of impotence and virginity, pleaded, in the 11th article, *that* shortly after the pretended marriage, the husband became greatly changed in his general demeanour, and particularly in his conduct towards his wife; *that* he was low spirited and dejected; *that* when she endeavoured, as she constantly did, to cheer him up by kindness and attention, he morosely repulsed her, declared that she was loathsome to him, that he would spit upon her, and that he wished she was dead; *that* during the months of August and September 1852, he constantly and habitually treated her, without any cause or provocation on her part, with great cruelty, &c.; and then, in the 12th, 13th, and 14th articles, pleaded various instances of cruelty.

The admission of the libel was opposed.

CONSISTORY
COURT OF
LONDON.

May 2.

Sentence of
nullity of
marriage by
reason of
impotence
after a co-
habitation of
three months
only.

Statement.

1854.

G—s
against
T—r

The Queen's Advocate and Dr. *Middleton* opposed its admission.
Dr. *Addams* and Dr. *Spinks*, *contra*.

DR. LUSHINGTON. I shall admit this libel, but direct the whole of the articles respecting the cruelty to be struck out. I would here observe, that such a plea is not only unusual, but if the object of the plea be to account for the short period of the cohabitation, it is unnecessary as far as appears at present; for I find that the 9th article pleads an incurable defect on the part of the husband, which will be apparent on inspection, in which case there is no necessity for any cohabitation. Should it appear in evidence, which I cannot anticipate, that the defect is only latent, and not visible, it will be time enough then for the Court to consider whether it should not, in aid of justice, allow a further plea to be given in. The libel must be reformed.

The libel was reformed; *the wife* and other witnesses examined upon it, and the husband's answers taken. Dr. *Blundell* and Dr. *Waller* were appointed inspectors. Their certificate as to the wife was to the effect that though there were no certain signs of virginity which could be relied on, yet that there was no evidence of perfect connection having ever taken place. As to the husband, their certificate was as follows: — "We find no anatomical malformation, but from oral information obtained, during a somewhat lengthened interview, we are decidedly of opinion that there is some physiological defect which has prevented him from completing the act of copulation. As we cannot discover any special cause to which a remedy can be applied, we fear this defect will be permanent."

When the case came on for hearing, the counsel for the husband said they should offer no opposition; upon which,

Judgment.

DR. LUSHINGTON pronounced for the nullity, and observed, that he could not think of sending the lady back to renew cohabitation, though he could have wished that it had been more distinctly stated that her health had suffered, and was liable to suffer, by such cohabitation.

Proctors: for the wife, *Wills*; for the husband, *Middleton*.

DREWE AND OTHERS *against* LONG, and also *against*
ROLF AND CAYFORD.

THIS was a cause or business of citing John Cayford and Mary Rolf, widow, the administratrix (with the will annexed) of George Rolf deceased, to show cause why the bond remaining in the registry of the Court, and entered into by the said George Rolf and John Cayford as sureties, together with John Long, the administrator, for his faithful administration of the goods of Eliza Long (wife of Charles Long) the deceased in this cause, should not be attended with and produced on the said bond being sued for at Common Law, promoted by Messrs. Drewe, Summers, and Acraman, the assignees of the said Charles Long.

Mrs. Eliza Long died on the 14th of October 1831, leaving her husband, Mr. Charles Long surviving. He was adjudicated bankrupt, at Bristol, in July 1839, when Messrs. Drewe, Summers, and Acraman were chosen and appointed his assignees. He died on the 6th of January 1844, without having administered his wife's estate. In May 1850, by the death of Mrs. Eliza Long's mother, a sum of nearly 400*l.*, to which Mrs. Long was entitled under the will of her father, accrued to her estate.

The assignees of Mr. Charles Long were desirous to take out letters of administration to his wife's estate, but were advised that, by the practice of the Court, his brother, Mr. John Long, was preferably entitled. On the 25th of January 1851, Mr. John Long took out letters of administration to the estate of Mr. Charles Long, as his brother and next of kin; and on the 13th of February 1851, letters of administration to the estate of Mrs. Eliza Long, as the brother and administrator of Mr. Charles Long, whilst living, the lawful husband of the deceased; but the assignees of Mr. Charles Long being apprehensive that Mr. John Long would convert the property to his own use, obtained the direction of the Court that he should exhibit an inventory, and give justifying security on the leading grant to the estate.

Repeated applications were made to Mr. John Long, by the solicitor of the assignees, to make payment to them of the net assets of the deceased's estate, which he refused to do. Accordingly, the permission of the Bankruptcy Court at Bristol having been first obtained, a bill in Chancery was filed in December 1852, on behalf of the assignees against Mr. Long, which resulted in a decree against him, to pay into Court the

1854.

PREROGATIVE
COURT OF
CANTERBURY

May 24.
June 6.

E. L. died intestate, leaving C. L., her husband, surviving. He became bankrupt (A., B., and C. being appointed his assignees), and then died without having administered to his wife. Some property subsequently accrued to his wife. J. L. then administered to his brother, C. L., and also to E. L., and having converted the property to his own use instead of paying it over to his brother's assignees, himself became insolvent. On application of the assignees, the sureties to the bond were cited to show cause *contra*, and the Court allowed the bond to be delivered out.

Statement.

1854.

DREWE
against
LONG, ROLF,
AND CAYFORD

Statement

sum of 277*l*. 16*s*. 8*d*., the amount adjudged by that Court to be the net assets of the estate of Mrs. Eliza Long, deceased, with costs. Mr. Long was duly served with a copy of that decree, and thereupon a notice, signed by his solicitor, was served on the solicitor of the assignees, to the effect that on the 3rd of June 1853, Mr. Long had executed an indenture of assignment of all his property for the benefit of his creditors. His assets were about 55*l*., and his debts and liabilities, exclusive of the assignees' costs, amounted to above 400*l*.

In consequence of the great insufficiency of assets, no further proceedings were taken in the Chancery suit, but proceedings were commenced in this Court against Mr. Long, calling upon him to exhibit an inventory and account, preparatory to an application to the Court to permit the administration bond to be attended with in an action at Law against the sureties.

The sureties were subsequently cited to show cause, &c.

They gave in an act on petition, stating the circumstances of the grant of the letters of administration, and alleging *that* John Long had appeared to the citation, and by virtue of his corporal oath brought in an inventory of the goods, chattels, and credits of the said Eliza Long which had come to his possession by virtue of the letters of administration, and an account of his administration thereof, which said inventory and account are now remaining in the registry of this Court; and further, *that* the said Aurelius John Drewe, George Summers, and Alfred John Acraman are respectively the trading and official assignees of, and represent the creditors of, the estate and effects of the said Charles Long," &c.

The answer on behalf of the assignees, after stating the facts of the case with respect to the administration, the Chancery suit, and Mr. John Long's insolvency, and assignment for the benefit of his creditors, alleged, "*that* he, by his inventory and account, has admitted a balance of assets amounting to the sum of 287*l*. 7*s*. 5*d*. unaccounted for, and *that* he has devastated and unduly and illegally converted and applied the aforesaid balance of the estate and effects of the said Eliza Long, deceased, to his own use; and further, *that* the said A. J. Drewe, G. Summers, and A. J. Acraman are, as such assignees as aforesaid of the said Charles Long, the sole persons entitled to his estate and effects, and as such are entitled to the net assets of the estate and effects of the said Eliza Long, whilst living, the wife of the said Charles Long," &c.

On these pleadings the case came on for hearing, but by direction of the Court it was deferred, in order that the parties might write further to the act.

Accordingly, a reply on behalf of the sureties was given in, alleging *that* the decree made upon the said John Long to give justifying security, is contrary to the rule and practice of this Court, and *that* though such decree was formally made before, yet *that* the same was never brought to the notice of the Judge himself; and further, *that* the said A. J. D., G. S., and A. J. A., representing the creditors of the deceased, cannot in Law assign for a breach of the bond the nonpayment of debts due to the said creditors, &c.

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DREWE
against
LONG, ROLF,
AND CATFORD.
Statement.

The rejoinder to this "denied the decree respecting the justifying security to be contrary to the practice of the Court, and alleged the same to be valid and sufficient in Law; and further alleged, *that* this Court has no power to decide what breaches may be assigned in an action at Common Law on the said bond, and *that* such a matter is wholly irrelevant to the application now made to the Court," &c.

Dr. Deane, for the sureties. There are two questions in the case: one arising only incidentally as to the practice of the Court; the other, whether the Court has any discretion or not in giving out or withholding the bond. As to the first, it has been repeatedly decided that creditors have no right to justifying security. In *Hughes v. Cooke* (a), Sir George Lee said, that creditors were only entitled to a *constat* of the estate, but had no interest in the administration bond, and, therefore, had no right to litigate the quantum of security, or to require the sureties to justify. So also in *Hackman v. Black*. (b)

Argument.

The second point is one of Law, raised in the reply and rejoinder. The sureties alleged that the assignees representing the creditors of the deceased cannot in Law assign for a breach of the bond the nonpayment of debts due to the said creditors; to which the assignees rejoined, denying the power of this Court to decide what breaches may be assigned in an action at Common Law on the bond, and alleging such matter to be wholly irrelevant to the application before the Court.

It is impossible to conceive upon what the learned counsel on the other side can rely. On an application for the delivery of the bond to be sued for at Common Law, this Court always looks to the question as to whether there has been a breach of the bond, and if there has not been, refuses to allow the bond to be attended with: *Younge v. Shelton*. (c) So in a later case, more to the point, inasmuch as the application was made to the Court by a creditor who desired to put the bond in suit, and alleged that there had been a breach of the bond by

(a) 1 Lee, 387.

(b) 2 Lee, 251.

(c) 3 Hag. 780.

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against
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the nondelivery of an inventory: *Crowley and Sharman v. Chipp and Tubb.* (a)

In the present case there has been no breach of the bond; the inventory and account have been given in, and the cases already cited from *Lee's Reports* showed that creditors are entitled to no more than a *constat* of the estate. To use the words of Lord *Holt*, in *The Archbishop of Canterbury v. Willis*, "The creditors of the deceased cannot in Law assign, for a breach of the bond, the nonpayment of debts due to the said creditors. (b) It will, perhaps, be argued, on the strength of *The Archbishop of Canterbury v. Robertson* (c), that in this case there had been a *devastavit*, and that on that account the creditors are entitled to sue upon the bond; but that case only goes the length of saying that under such circumstances the *next of kin* are entitled to recover on the bond. The doctrine that creditors cannot sue upon the bond for their debts, was there recognized and affirmed: for Lord *Lyndhurst* cited the words of Lord *Holt*, "a creditor shall not take an assignment of the bond, and sue upon it, and assign for breach the nonpayment of a debt to him, or a *devastavit* committed by the administrator, for that would be needless and infinite;" and said, "What I understand to have been the meaning of Lord Chief Justice *Holt* upon this is, that a creditor shall not sue for his debt upon the bond, *even if* he suggests a *devastavit*." (d) There is no doubt that is the correct report, though in *Tyrwhitt's* report of the same case the word "*unless*" is substituted for "*even if*." (e) The law upon the point is so clear that the Court will not only refuse the application, but condemn the assignees in the costs.

Dr. *Spinks* (the *Queen's Advocate* being absent), for the assignees.

It seems quite immaterial, with regard to the application before the Court, whether it is, or is not, its practice to direct justifying security on the application of creditors: because, in the first place, the fact of the sureties to the bond having justified or not, cannot affect the rights of a party to sue upon it; their ability and their liability to pay are distinct questions; secondly, the question cannot arise in the present case, inasmuch as the sureties now cited did not justify when they joined in the bond now applied for, viz., the bond for the due administration of *Eliza Long's* estate. The sureties to the bond in the case of *Charles Long's* estate — the leading grant — justified. Their

(a) 1 Curt. 456.

(b) 1 Salk. 316.

(c) 1 Crompt. & Mee. 690.; 3 Tyrwh. 390.

(d) 1 Crompt. & Mee. 711.

(e) Tyrwh. 416.

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 Argument.

being the same persons is an accident. However, the position of the learned counsel respecting the practice is not correct. The cases cited occurred nearly a century ago, since which the practice has been altered. In the case of *Catherine Noel* (a), the Court, on the application of creditors, directed her husband, resident abroad, to give justifying security. [*Per Curiam*. In that case the husband resided abroad, which would make a material difference.] With submission to the Court, the residence abroad could make no difference if the position were correct that creditors had no interest in the administration bond. What would it matter to them whether the sureties justified or not? Sir *John Nicholl*, by granting the application, seemed to show the position to be questionable.

It has been argued, and cases have been cited to prove, that creditors cannot assign the nonpayment of their debts as a breach of the administration bond; but neither is that the question for the consideration of the Court in the present case; because, in the first place, the rights of creditors, with regard to the administration bond, cannot be made the measure or limit of the rights of assignees, who are to be regarded in a very different light; and because, in the second place, even supposing there was such an analogy between them that the rights of assignees were limited by those of creditors, they must, in order to make the cases cited applicable, be creditors of the estate for the due administration of which the bond applied for here, or sued upon elsewhere, has been given; whereas in the present case the bond applied for concerned *Eliza Long's* estate, of which there are no creditors, but the parties applying are the assignees of *Charles Long's* estate. It is necessary to bear in mind throughout the case that there are two estates, and two administration bonds.

The present is a case *primæ impressionis*, and no case cited has any bearing upon it. The assignees of *Charles Long* are not to be regarded simply as creditors, but as his representatives with respect to his estate. By stat. 1 & 2 Will. 4. c. 56. s. 25. and 6 Geo. 4. c. 16. s. 63., all the personal estate, present and future, of a bankrupt, vested in his assignees. On the death of *Eliza Long*, in 1831, her reversionary interest belonged to her husband, and upon his bankruptcy, in July 1839, it vested in his assignees. If the assignees might not, by the practice of the Court, administer the estate which by statute vested in them, the Court will not throw any obstacle in the way of their obtaining redress for the loss they have sustained through the maladministration and conversion of the estate by the adminis-

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trator appointed by the Court. It is not for this Court to decide the liability of the bondsmen, but merely whether the applicants have made out such a *prima facie* case as will induce the Court to allow them to try the question at Law. They are advised that they have a remedy at Law, and all they ask of the Court is to allow them to put the bond in suit to obtain it. If the Court refuse, the assignees are barred of their remedy, and injustice may be done; but if the Court grant the application no one can be injured, for if the bondsmen be not liable, the costs of trying the question will fall upon the assignees.

From the affidavits in this case it is clear that there has been a *devastavit*, and a conversion of the statute to the administrator's own use; and that, upon the administrator's becoming insolvent, the property has been entirely lost to the estate. Under similar circumstances the Court allowed the bond to be attended with in *Younge v. Shelton* (a); and it was held in the Court of Exchequer, that such a conversion was a breach of the condition of the bond "well and truly to administer the goods of the intestate according to law:" *Archbishop of Canterbury v. Robertson*. (b) In accordance with which the learned Judge of the Consistory Court allowed the bond to be attended with, though the sureties had not ever been cited to show cause against it: *Broadwood v. Holland*. (c) But it is objected that that doctrine applies only to next of kin, and not to creditors. That may or may not be so; but assignees, as regards their

(a) 3 Hagg. Ecc. 780.

(b) 1 Crompt. & Mee. 690.

(c) 1 Ecc. & Adm. Rep. 5. The Chancery proceedings in that case resulted in a decree against the administratrix to pay to the plaintiff one third of the residue after certain deductions. Application was again made to the Consistory Court for the bond. It was supported by an affidavit to the effect, that the administratrix could not be served with the decree in Chancery, and that it was believed that she purposely kept out of the way. Upon this, Dr. Lushington (Dec. 13.) directed the bond to be attended with to be put in suit against the sureties, but gave no opinion as to its forfeiture. The case was tried under the name of the *Bishop of London v. McNeil*; the plaintiff obtained a verdict, and on the 13th of June last the Court of Exchequer held that he was entitled to *substantial* damages.

At page 107. of this volume, another case, *Lucas v. Johnson*, is reported, which has since been be-

fore a Court of Common Law. It seems that instead of continuing the proceedings regularly to obtain the permission of the Court for the bond to be attended with, the plaintiff by some means induced the executrix of the late Archbishop of Canterbury to allow her name to be used, and the case was tried in the Queen's Bench on the 4th of July last, *Howley (widow and executrix of the late Archbishop of Canterbury) v. Gordon*. One point of the defence was, that by the practice of the Ecclesiastical Court, an administration bond could not be enforced against a surety without the express order of the Court, which had not been made in this case; but the jury found that the practice alleged by the defendant was not proved. How they could have arrived at such a conclusion it is impossible to say; but certainly the verdict took the Profession by surprise, as it is believed the case itself forms the only exception to the practice.

title, resemble next of kin rather than creditors. Like next of kin, they have a statutory title, and their claim even takes precedence of that of next of kin.

It has been held that the executor of a bankrupt cannot take out a commission of bankrupt for a debt due to his testator, on the ground that such debt vested in the assignees: *Ex parte Goodwin*. (a)

The Court, therefore, will not, in the exercise of its judicial discretion, reject the present application, and thereby prevent the assignees from seeking justice elsewhere.

Dr. Deane, in reply.

This is a novel attempt to introduce into this Court the assignees of a bankrupt as the representatives of his estate in the same way as the next of kin. It may be true that in Law the property of a bankrupt vests in his assignees; but it is absurd to say that they thereby have any resemblance to next of kin, for the whole proceedings of their appointment and the nature of their duties show that they are the mere representatives of the creditors, and must be regarded in the light of creditors. It is useless to cite authorities to prove this. It is shown through the whole mass of cases collected in *Harrison's Digest* under the title "Bankrupt." The Court will, therefore, not allow itself to be misled by the fallacious argument of the other side, but regard the assignees as creditors, and, in accordance with decided cases, reject this application.

The Court reserved its judgment.

SIR JOHN DODSON, after stating the circumstances of the case as set forth in the statement and in the act on petition, proceeded: That is the statement made on behalf of the sureties cited, and upon that statement they pray to be dismissed. The facts are not denied by the assignees, but they say that they, being the assignees of Charles Long, were desirous of obtaining letters of administration of his estate and of the estate of Eliza Long, his wife, to be granted to them in preference to the said John Long, they being apprehensive that John Long would not faithfully administer the same; but that they were legally advised that by the rules of this Court they were not entitled thereto without the consent of the said John Long. No doubt they were well advised upon that point; Mr. John Long was the brother and next of kin, and was therefore entitled to the grant, not only by the practice of the Court, but by the Act of Parliament. (b)

1864.

DREW
against
LONG, ROLF,
AND CAITFORD.
Argument.

Judgment.
June 6.

(a) 1 Atk. 100.; Wms. Exors. 807. 4th edit.

(b) If so, some alteration in the law would seem desirable; for the

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DREW
against
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AND CATFORD.

Judgment.

They go on to say that they subsequently commenced proceedings in Chancery, and obtained a decree against Mr. John Long, by which the sum of 277*l.* 16*s.* 8*d.*, was adjudged to be due to them, and that he then declared himself insolvent. They also say that in the inventory or declaration, made and sworn to by Mr. John Long, and exhibited by him in this cause, he has admitted that personal effects of Eliza Long to the amount of 391*l.* 7*s.* 8*d.* have come to his hands, and that he has only claimed, in his account, the sum of 104*l.* 0*s.* 3*d.*, which leaves a balance of 287*l.* 7*s.* 5*d.* unaccounted for.

This being the case, it must, I apprehend, be considered a *devastavit* to that extent. Now, the assignees assert that they were the only persons entitled to receive this property, and are the only persons who have been damnified by its conversion by the administrator; they therefore claim to be allowed to put the administration bond in force against the sureties, in order, if possible, to indemnify themselves for their loss.

This was the state of the case upon the pleadings when it was first brought to the attention of the Court. In consequence, however, of an objection having been raised by Dr. *Deane*, which, as *The Queen's Advocate* urged (and the Court was of the same opinion), ought to have been stated in the pleadings, the Court directed that the case should stand over that the act might be further written to. Accordingly, on behalf of the sureties, it was stated that the decree made upon Mr. John Long to give justifying security, at the prayer of the assignees, was contrary to the rule and practice of the Court, and had never been specially brought to the notice of the Judge.

Now, I do not think it necessary for me to enter upon any discussion of this question. Whatever may have been the practice with regard to such applications on behalf of creditors, it cannot be contended that the Court has not full power to require justifying security if it should think proper. There is no doubt the statute (*a*) provides that "the Judge shall and may, on granting and committing of administration of the goods of persons dying intestate, take *sufficient bonds with two or more able sureties*, respect being had to the value of the estate." The sufficiency rests in the discretion of the Court.

This question, however, has no application to the present case, for it appears that there are two bonds, and that the sureties to that respecting which this application is made were not required

grant to the assignees, the parties entitled to the property, would have avoided the necessity of the suit in Chancery, the suit in the Preroga-

tive Court, and the suit at Common Law upon the bond.

(*a*) 22 & 23 Car. 2. c. 10. s. 1.

to justify. They were called upon to justify upon the other bond, but not on this. The bonds are distinct, though the sureties happen to be the same. The observation of the learned counsel, therefore, falls to the ground.

The only remaining objection is, that the parties making this application being the trading and official assignees, and, as such, representing the creditors of the deceased, cannot in law assign for a breach of the bond the nonpayment of debts due to the said creditors. Numerous cases were cited by the learned counsel to establish his position; and it is from those cases that Mr. *Williams* has stated the Law respecting the administration bond, for he says, "it is no ground of forfeiture that the administrator has not paid the debts of the intestate; and therefore, a creditor cannot sue upon the bond in the name of the ordinary, and assign for breach the nonpayment of the debt to him." (a)

He states in what the various breaches of the bond consist,—the nondelivery of the inventory, the nondistribution of the residue after a decree of the Ecclesiastical Judge, or a conversion of assets so that they are lost to the estate; but he expressly says that creditors cannot sue for the nonpayment of their debts; and therefore, I am of opinion that they would not be entitled to come to this Court and ask for the bond to be delivered out to them.

The replication of the assignees, however, is, "that this Court has no power to decide what breaches may be assigned in an action at Common Law upon the bond, and that such a matter is wholly irrelevant to the application now made to the Court." In fact, that this Court has no power to decide whether the bond is forfeited or not, and whether it should be delivered out for the purpose of being attended with in a Court of Common Law. But I apprehend this Court has always exercised a discretion on that subject. When it clearly appears that the party making application to the Court has no right whatever to sue upon the bond, the Court has not hesitated to reject the application; but if there should be any real doubt upon the subject, and the Court should think it not improbable that the party might be entitled to recover upon the bond, this Court has allowed the bond to be delivered out, and has given no opinion of the forfeiture of the bond, but has left that point for the decision of the Courts of Common Law.

Now, I must confess that I imagined, from the latter part of the averment in the replication, that it was intended to deny the Court any discretion whatever in the matter; but I found from the argument of the learned counsel that what was meant was

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this, that the averments on behalf of the sureties respecting the inability of creditors to sue upon the bond were irrelevant, because assignees were not to be considered in the light of creditors at all; that they were clothed with a peculiar character by Act of Parliament, and had peculiar rights and privileges assigned to them.

It appears to me that there is much force in this observation. They certainly are not merely creditors, for although they may be appointed for the benefit of the creditors, yet their appointment as assignees divests them of the character of mere creditors, and clothes them with a new one. By Act of Parliament the whole property of the bankrupt vested in them; they represent the estate, and are enabled to act in all respects in behalf of the estate, and they now come to this Court as the party entitled to the property of the deceased, and not as creditors of the deceased's estate. They come here with the same rights as Charles Long, and there can be no doubt that Charles Long would have been entitled to have this bond delivered out to him.

Whether the Court of Common Law will decide that this bond is forfeited, and that the sureties are liable, I cannot undertake to say; but it does not seem to me at all improbable that such may possibly be the result of a trial. If so, I consider it to be the duty of this Court to throw no impediment in the way of that trial, but to allow the bond to be attended with. I give no opinion to prejudice one side or the other as to the forfeiture; but as it is, as far as I am aware, a case *primæ impressionis*, I shall direct the bond to be attended with whenever it shall be required.

Proctors: for the sureties, *Gregory*; for the assignees, *Pritchard*.

PREROGATIVE
 COURT OF
 CANTERBURY.

May 29.

June 6.

Bona notabilia.
 The paraphernalia of a wife living separate from her husband, and in a different jurisdiction, do not constitute *bona notabilia*.

EKINS *against* BROWN AND OTHERS.

THIS was originally a business of citing Elizabeth Brown, spinster, Robert Rosebrooke Morris, and Francis Eady, the executors named in the will of William Ekens, late of Brixworth, in the county of Northampton, deceased, to bring into and leave in the registry of this Court the said will, bearing date the 19th of April 1853, and to propound the same in

On the death of a partner, his share of the partnership property in possession, however large, does not constitute *bona notabilia* if the estate be insolvent, and there be no balance after the liquidation of all partnership claims.

solemn form of law, or show good and sufficient cause why the same should not be pronounced null and void, and the deceased declared to have died intestate, promoted by Anne Ekins, widow, the relict of the deceased.

The circumstances of the case were these: In the year 1840, Mrs. Ekins obtained, in the Arches Court of Canterbury, a divorce *a mensâ et thoro* from her husband on the ground of cruelty, and received an allotment of alimony at the rate of 20*l.* per annum. In consequence of an improvement in the circumstances of Mr. Ekins, a further allegation of faculties was given in, and his answers taken thereto in the month of September 1841. These proceedings, however, dropped by reason that Mr. Ekins, by an indenture made on the 13th of April 1842, secured to his wife an annuity of 150*l.* per annum for her life, in lieu of alimony allotted, or any claim for an increase thereof. Mr. and Mrs. Ekins, from the time of their separation never saw nor held any communication with each other, but the annuity has been both before and since her husband's death, regularly paid to Mrs. Ekins.

Mr. Ekins died on the 19th of January 1853, and in August following probate of his will was, after some opposition on the part of the next of kin, granted by the Archdeaconry Court of Northampton to the above-named executors — the whole of the deceased's personal estate being within the jurisdiction of that Court. On the 3rd of October a decree issued under seal of this Court, alleging that the deceased had whilst living, and at the time of his death, goods, chattels, or credits in divers dioceses or peculiar jurisdictions sufficient to found the jurisdiction of the Court at the suit of the said Anne Ekins, and calling upon the executors to bring in the will, &c.

The executors appeared by their proctor under protest as to the jurisdiction of the Court.

An allegation was then given in on behalf of Mrs. Ekins, pleading in substance:—

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1st art. *That* John Ekins, the deceased, died at Brixworth, in the Archdeaconry of Northampton, possessed at the time of his death of goods in divers dioceses or peculiar jurisdictions in the province of Canterbury, by reason whereof the proving and registering any will, or granting administrations, &c. are known only and wholly to appertain to the archbishop of this province, his master, keeper, or commissary of the Prerogative Court of Canterbury, or his surrogate, and not to any inferior Judge.

2nd. *That* at the time of his death, his wife, who was divorced from him, was living in Omega Terrace, Regent's Park, in the

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county of Middlesex, out of the jurisdiction of the Archdeaconry Court of Northampton, but within the jurisdiction of the Prerogative Court of Canterbury; *that* there were at the then lodgings of his said wife divers articles of plate and jewellery, and other goods and chattels, which were in law the property of the deceased, and, *that* the same amounted in value to more than the sum of 5*l*.

3rd. *That* the deceased at the time of his death was a co-partner with Charles Higgins in respect of a racing mare called "Maria Monk," and entitled to one half share of the value thereof; *that* her value was at least 100*l*.; *that* she ran for the Waltham Abbey steeplechase on the 30th of November 1853, and is entered to run at Derby, on the 8th of February next (1854); *that* at the time of deceased's death the said mare was located and in training at or near the residence of Mr. Higgins, at Devizes, in the county of Wilts or elsewhere, out of the jurisdiction of the Archdeaconry of Northampton, and within the jurisdiction of the Prerogative Court of Canterbury, and *that* since the death of the deceased a bill has been tendered for payment to the executors of the deceased, in respect of his share of expenses of the keep and training of the said mare.

4th. *That* divers sums of money were due to the deceased at his death from persons living and resident out of the jurisdiction of the Archdeaconry Court of Northampton, but within the jurisdiction of the Prerogative Court of Canterbury.

The answers of the executors were taken, and in their answer to the third article, which was read and thus made evidence at the hearing, they admitted the fact of the partnership, and that the mare was, at the time of the death of the deceased, of the value of 30*l*., but no more. They further answering said, that the deceased was partner with the said Charles Higgins in the articulate and other racing transactions; and that *there was due and owing from the deceased at the time of his death on account of such partnership 260*l*. and upwards.*

No plea was given in by the executors, but the case was argued upon the evidence produced by Mrs. Ekins, and the point of law raised in this answer.

Argument.

Dr. Bayford, for the widow, cited *Story's Law of Partnership* (a), *Ram. on Assets* (b), *Crosley v. Archdeacon of Sudbury* (c), *Roper's Husband and Wife*, "Paraphernalia."

Dr. Addams (with whom was Dr. Spinks), for the executors, cited *Williams' Executors* (d), *Black. Com.* (e), *Graham v. Lon-*

(a) Sect. 346. p. 493. edit. 1841.

(b) Pp. 783. 204.

(c) 3 Hagg. Ecc. 197.

(d) Part ii. book 3. 4th ed. pp. 663.

et seq.

(e) Vol. 2. book ii. ch. 29. p. 436.

donderry (a), Lucas v. Lucas (b), West v. Ship (c), Gwynne on Probate Duty. (d)

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SIR JOHN DODSON. William Ekins, late of Brixworth, in the Archdeaconry of Northampton, died at his residence within that archdeaconry, on the 19th of January 1853. He made a will, of which, after some litigation between the executors and Mr. Ekins, the brother of the deceased, probate was granted by the Archdeaconry Court, but whether this was done in virtue of a compromise between the parties to the suit, or how otherwise, does not appear.

The case in this Court commenced by a monition at the instance of Mrs. Ekins, the widow, calling upon the executors to bring in the will, and propound the same, or to show cause why it should not be pronounced null and void — that is, that the deceased died intestate. An appearance was given for the executors, but under protest to the jurisdiction of the Court, which protest was afterwards extended; but as that has not been laid before me, I have no exact knowledge of its contents, nor is it perhaps necessary that I should have. I have not seen it at all.

An allegation was afterwards given in by the widow, upon which she herself and one other person have been examined as witnesses. The answers of the executors have also been taken, and upon this evidence the Court is called upon to decide between the parties — the sole question being whether the deceased left *bona notabilia* out of the Archdeaconry Court where he died, so as to found the jurisdiction of the Prerogative Court of Canterbury. The averment of the widow, as set forth in the second article of her allegation is, that she duly obtained a sentence of separation from her husband in the Arches Court, in the month of April 1840; that she from that time lived separate and apart from him, principally in the immediate neighbourhood of London; and that at the time of her husband's death she was residing near the Regent's Park, and not within the limits of the jurisdiction of the Archdeaconry Court of Northampton. That, being so resident, she had in her custody or possession divers articles of plate and jewellery, and other goods and chattels, which were in law the property of the said William Ekins, and that the same were of greater value than 5*l.*, so as to constitute *bona notabilia* out of the jurisdiction where he died, and consequently that the jurisdiction of this Court is well founded. She further alleges in the third article

(a) 3 Atk. 398.

(b) 1 Atk. 270.

(c) 1 Vez. 242.

(d) P. 22.

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that the deceased was copartner with Charles Higgins in a racing mare, and that as such he was entitled to the half of her value, which was at the least 100*l.*, the sum ranging from 300*l.* to 100*l.* and that such mare was, at the time of the death of the deceased, located near Devizes, in Wiltshire, and out of the Archdeaconry Court of Northampton. So that there were likewise *bona notabilia* there according to her statement.

The evidence on the first averment, namely, as to the plate, jewellery, and other goods and chattels in the possession of the widow, is to be found in her own deposition in chief, and upon interrogatory, and in a document annexed to the deposition of Mr. Page, an appraiser, who was employed by her to set a value on these goods, or at least on some of them. The account which she gives of the goods in her possession when she was resident near Regent's Park, is this: she says she had a gold guard chain and watch, that she had a very handsome writing desk, a valuable silk shawl, a great deal of table linen, a large damask table cloth, and also a work box with silver fittings, and trinkets and bracelets. Then she goes on to say that she cannot undertake to state the value, but she swears that they are above the value of 5*l.*, according to the best of her belief.

Upon the interrogatories she is asked especially as to the value of the several articles, and the account which she gives is this: she says that the gold guard chain and watch are of the value of 2*l.*, the very handsome writing desk she reckons at 3*l.*, then there is a valuable large shawl estimated at from 2*l.* to 3*l.*, the table cloth she values at 1*l.*, and then there is this work box, the trinkets, bracelets, and so forth, but she gives no further special value. Mr. Page, the appraiser, brings in an inventory, annexed to his deposition, of the articles he found, and the valuation he made. He represents it thus: two yards and a half of Brussels lace, which Mrs. Ekins had also mentioned, but calls it three yards (and which seems to have composed the sleeves of her grandmother), a splendid writing desk inlaid with Buhl, a handsome large damask table cloth, work box with silver fittings, and a gold chain; and he says that the value of the whole of these things is 11*l.* 15*s.* He is asked to specify the value of each article, but that he declines, and says it is not his custom, nor is it the custom of the trade; he adds that he does not mind giving 11*l.* for them himself.

If these things were all to be considered the property of the husband, then, according to the evidence of Mr. Page and Mrs. Ekins herself, there would be goods and chattels beyond the value of 5*l.*, and consequently, there would be *bona notabilia*. But when I come to look at these articles, I think they are for

If the articles
in possession
of the widow
were all the
property of
the husband
there would

the most part to be considered, after the death of the husband, not as property belonging to him, but as paraphernalia belonging to the widow herself. The gold guard chain and watch seem to have been her property originally; they were both gifts to her, and these and all the other things were taken away by her when she obtained a sentence of divorce against her husband in the Arches Court, so long ago as 1840, and they have been retained in her possession from that time to the present, and were so retained with the knowledge of the husband during his lifetime. I apprehend many of the articles were so far her property that if the husband had thought proper to have taken them away from her, the Court of Arches, which granted the divorce, might have compelled him to deliver them up for her use. It is quite true that even the paraphernalia of the wife, during the lifetime of her husband, are to be considered his property; he has a right to sell them—to give them away, and the wife cannot retain them; he may pawn them, destroy them, and treat them as his own property; but upon the death of the husband, I apprehend they survive to her use, and if she is in possession of them she may retain them. It is not necessary that they should be delivered into her hands through the executors. That is the case with almost all these articles. The goods of the description of the gold guard chain were treated as ornaments belonging to herself; there might have been some doubt as to the writing desk, but that was for her use, and she was allowed to retain it. If it does not come strictly within paraphernalia, it would not amount to the value of 5*l*., because, though she does state in her deposition in chief that that alone is worth 5*l*., yet, when she is called upon in answer to an interrogatory to specify the value, she calls it 3*l*. only. Then as to the other goods, the shawl and Brussels lace, they were clearly a part of her property, and come strictly within what is called paraphernalia. According to all the books, — indeed, many of the old books carry the matter much further,—dress and trinkets worn during the lifetime of the husband not only belong to the wife, but, according to some of the old cases, she has a right to take them away for her own use.

The appraiser, then, having declined to estimate the value of these things so that I can consider whether any one of them amounts to the value of 5*l*., I must take it that they do not. The wife is bound to produce proof that they were of more than 5*l*. value,—that she had goods in her possession belonging to her husband worth more than that amount, and that she has not done.

It has been said even with regard to paraphernalia, they are to

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be *bona notabilia*, but many of them were in fact the wife's paraphernalia.

Some of these articles the Court of Arches, which divorced them, might have compelled the husband to deliver up to the wife, if he had taken them from her.

It may be quite true that during the lifetime of the husband the wife's paraphernalia are entirely subject to the control of the husband, but at his death they survive to the use of the wife, and remain in her possession.

It is not proved that any article not strictly paraphernalia amounts in value to 5*l*.

Though para-

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paraphernalia may be subject to the husband's debts, yet the wife has a right to retain them until a deficiency of assets compels the executors to claim them.

be considered as the property of the husband, because the executors would have a right to take them in case there were not sufficient assets otherwise belonging to the husband for the payment of his debts. It is said this is the true test whereby to ascertain in whom the property was vested. It has been argued that it was not the husband's, because the executors might have claimed these articles for the payment of his debts. But according to the cases, it is laid down that the wife has a right to detain the things in her possession; she is not called upon to make application to the executors, or to obtain possession of them through them; all that is said with regard to executors is this, they have a right to claim them in case there is not sufficient to pay the debts.

There is a passage in *Williams on Executors* (a) which gives the sum and substance of it, where, treating of paraphernalia, he says, "Another instance where the wife may acquire property in her husband's personal chattels as by gift from him so as to exclude his executors and administrators, is to be found in her paraphernalia." In a preceding sentence he has been stating what property the wife may have separate and independent of her husband, at the death of that husband, and now he adds to this the paraphernalia, which, he says, the executors and administrators of the husband are excluded from. They therefore can have no right to take them in the first instance, but if the wife is in possession of them she may retain them to their exclusion.

There is no proof of *bona notabilia* at the residence of the wife.

I am, therefore, of opinion that the alleged *bona notabilia* in possession of the wife at her residence near the Regent's Park is not made out in proof before the Court. She does not establish *bona notabilia* there; indeed, it seems somewhat extraordinary on the part of this lady that she swears she believes they were goods and chattels belonging to her husband, for she took them away from him, and had the use of them from 1840 down to his death; and, on that event taking place, how does she act with respect to them? Why she retains some of them. What does she do with them? Give them to the executors? No; she gives them to her friends; she has treated them as her own. Her conduct is perfectly consistent with what I apprehend to be the law. She was justified in treating them as paraphernalia belonging to herself. There may have been an article of small value which does not come within that description, but the main body do come under it, and I think that upon the death of the husband they were the separate property of the

wife, and she seems so to have considered them. I think, therefore, that that part of the case is not proved, namely, that the husband had goods of the value of 5*l.* and upwards.

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The other branch which is relied upon as constituting *bona notabilia* out of the archdeaconry, is a moiety of the value of this racing mare, which was held in copartnership with Mr. Higgins, and which at the time of his death was at or near to Devizes, in the county of Wiltshire. Upon this part of the case, which is set forth in the third article of the wife's allegation, no witnesses have been examined, but the answers of the executors have been read and commented upon. In these answers the executors say they admit the facts to be as pleaded, save as to the value of the mare, which they believe was not more than 30*l.* I think I must take it that the value of the mare is 30*l.*, and if a moiety of the value was the property of the husband, there would be *bona notabilia* beyond the value of 5*l.*, because 15*l.* belongs to him in that mare. But then they go on to say, "That the deceased was partner with Mr. Higgins in the mare; and in the articulate and other racing transactions there was due and owing from the deceased at the time of his death on account of such partnership 260*l.* and upwards." Now upon this state of facts it has been contended on the part of the widow that the husband had goods of more than the value of 5*l.* out of the Archdeaconry of Northampton, namely, in Wiltshire, consequently that there was this *bona notabilia*. On the other hand, it is contended that there were no goods and chattels belonging to the deceased in the county of Wiltshire, under the circumstances stated, and the question for the consideration of the Court is, whether there were or were not.

That must depend very much upon this: What was the property belonging to the deceased in the county of Wiltshire, and how is it to be estimated? When persons are in partnership in trade or otherwise, they are considered as joint tenants; and the general rule where there are joint tenants is, that the property which they hold as joint tenants goes to the survivor; but in the case of trade or partnership in this country it is not so. Upon death of a joint tenant the partnership dissolves, but a portion of it belongs to the survivor, and the other portion to the executors of the deceased, according to their respective shares; but then, the matter for consideration is, how is the value of the property to be collected? On the one side it is contended that the mare being in possession, and being of the value of 30*l.* there was *bona notabilia*. On the other side, it is said that the executor of a deceased person is not entitled to any share in the property until the goods have been collected, until the part-

On the death of one partner in trade, a portion belongs to the surviving partner and a portion to the executors of the deceased.

The question is, whether the executors take their share of the property in possession, or

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their share of
the balance
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nership accounts are made up; and then he is entitled to the balance, and the balance only. Upon this it will depend whether there was *bona notabilia* or not, because though it is admitted that the mare was of the value of 30*l*., yet it was a partnership concern; and if from the partnership there were 260*l*. due and owing, according to that mode of settlement there would be nothing at all for the executors to take.

It has been admitted by the counsel for the widow in this case, that whatever was due to the partnership, the surviving partners are to get in and collect, and to divide it when they have so done. But it is said there is a great difference as to what is in possession; that what is in possession belonging to the deceased, immediately becomes the property of his representatives, namely, of his executors. In this case, and in support of this, an authority has been relied upon, namely, Mr. Justice *Story*, in his *Commentary upon the Law of Partnership*. This certainly is a book entitled to very great weight; no doubt he is a very eminent writer, and is esteemed universally, both here and in America; indeed, we may say he has a world-wide reputation; there is no modern writer whose legal works are better worth attending to than those of Mr. Justice *Story*. It is true, as stated by Dr. *Addams*, that he is not a writer on the Law of England, but he is very conversant with the laws of this country and of America, where he has occupied the highest judicial station, and he is entitled to the greatest respect. It is quite true, as stated by the learned counsel, that we have text writers of our own, and supposing that there were decided cases in our Courts of a contrary tenor, the Court must pay attention to the former, and not to the views taken on such matters by Mr. Justice *Story*. But when I look into Mr. Justice *Story's* book I do not find that the doctrine he propounds differs materially from that laid down in our own books. The passage which has been relied upon is as follows: "One of the consequences of a dissolution of partnership by death (under the qualifications above suggested), is that the personal representatives of the deceased become tenants in common with the survivors of all the partnership property and effects in possession." (a) It is generally admitted, while living they are joint tenants, but upon death there is a difference; they become, as it were, tenants in common, not in possession. It was upon that principle the learned counsel founded his argument that this mare was in possession, that she was of the value of more than 5*l*., consequently the executor was entitled to that. Mr. Justice *Story* goes on to say: "We say the partnership property and effects in possession, for

The doctrine laid down by Mr. Justice *Story* is, that the representatives of a deceased partner have an interest in and share the balance only of the estate after the liquidation of all claims.

(a) *Story's Comment. on Partnership*, ch. 14. § 346.

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there is at the Common Law a material distinction between such property and effects in possession and *choses in action*, debts, and other rights of action belonging to the partnership." That is exactly the position which the learned counsel took here. "The latter, at Law, belong to the surviving partners, and they possess the sole and exclusive right and remedy to reduce them into possession; although, when so recovered, the survivors are regarded as trustees thereof for the benefit of the partnership, and the representatives of the deceased partner possess in Equity the same right of sharing and participating in them which the deceased partner would have possessed if he had been living. However, the representatives of the deceased partner cannot, strictly speaking, be deemed partners with the survivors." The partnership does not go on; the business carried on afterwards belongs to the survivors. "But still, a community of interest subsists between them which is necessary for the winding up of the affairs of the partnership, and requires that what is partnership property before, shall continue so, for the purpose of being applied to the discharge of all the proper debts and obligations thereof; and for a final distribution of the surplus, according to the rights and shares of the partners." So that the things in possession are to be applied for winding up the affairs, and at the end, when they are thus wound up, they are to take according to their respective shares. Mr. Justice *Story*, in the first paragraph, must have meant goods reduced into the possession, after all the debts have been paid, after there has been a liquidation, and in ascertaining of the balance; because it is clear, from the concluding passage, that after these matters are arranged, the shares are to be divided. Now, if this mare was of the value of 30*l.*, and the debts 260*l.*, there would be nothing to be divided on each share, and, consequently, no *bona notabilia*.

But this matter has been made very clear by some decisions in English Courts. In the case of *West v. Ship (a)*, the Lord Chancellor thus expresses himself: "The partners themselves are clearly joint tenants in the stock and all effects;" — that is, the partners while living — "not only that particular stock in being at the time of entering into the partnership, but to continue so throughout, whatever changes might be made in the course of trade. Otherwise, it is impossible to carry it on. And being seised *per my et per tout*, when an account is to be taken, each is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought; and nothing is

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of the English
Courts are to
the same effect.

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to be considered as his share, but his proportion of the residue on balance of the account—that is, between living partners; because nothing is to be considered as his share, but his proportion of the residue on balance of the account. That this is so at Law appears from two cases, 2 *Lord Raym.* 871., and *Heydon v. Heydon*, Sal. 392., where it was held, that judgment and execution against one partner for his separate debt does not put the other in a worse condition; for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him.” Then he goes on thus: “So if one partner had died, the debts and effects survived; but yet the survivor is considered in this Court barely as a trustee for the representatives of the deceased; upon which footing the account would be taken, and nothing considered as the share of the survivor till afterwards.” Why then, till after the accounts were settled by the surviving partner the shares are not to be divided, and nothing is to be considered as the share of one or the other except the balance of the account. Therefore, it is really the balance of the account at which we are to look. He then goes on to describe joint tenancy, and tenancy in common.

But the matter does not rest there, because it is referred to in the case of *Taylor v. Fields* (c); that puts the matter beyond all doubt. The Court took time to consider its judgment in that case, and then the *Lord Chief Baron* delivered their opinion: “The right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion that the *corpus* of the partnership effects is joint property, and neither party separately has anything in that *corpus*; but the interest of each is only his share of what remains, after the partnership accounts are taken.” That relates to the partners themselves, not to the representatives of one; but he goes on further and says: “What is the manner in which the debtor himself had it? He had that which was undivided, and could only be divided by first delivering the effects from the partnership debts.” Therefore, that is still to the same effect as between these parties. Again, he says: “The mode makes no difference; but in all those cases the application takes place of the rule that the party coming in the right of the partner, comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be available, or be delivered, but under an account between the partnership and the partner; and it is an item in the account, that enough must be left for the partnership debts.” That is an item in the account—that is, between

living partners. He then says: "A great deal has been said of the inconvenience. What is the inconvenience? It is true, the individual trusted to the partnership fund in his idea at the time he was lending the money; not that I believe that is very common. But it may be dangerous in a thousand instances to have anything to do with a trader; as, for instance, to purchase an estate; for an act of bankruptcy may have been committed five years before, which will reach the estate. But look to the danger on the other side: one partner giving a bond, and the creditors of the partnership looking to the stock itself. It is said, that in this case the joint creditors had done nothing; and this meritorious creditor has a right to be preferred, on account of his early diligence. But what is that to which he is entitled? The estate of a partner is debtor to him. The question therefore recurs to the consideration what it was that partner had, for the creditor cannot be entitled to any more;" nor can the executor, I apprehend, be entitled to any more. Then further on he says: "It therefore argues nothing to say he has the merit of diligence, till we see upon what that merit can attach. If the partner himself therefore had nothing more than an interest in the surplus beyond the debts of the partnership upon a division, if it turns out that at Common Law that is the whole that can be delivered to, or taken by, the assignee of a partner, the executor, the sheriff, or the assignee under a commission of bankruptcy,"—so he puts these as alike—nothing more can be taken by a partner, or by an assignee, or by an executor. That is the very point: the accounts must be balanced, you are to take what there is already by possession, and then look after the rest; but there must be an account taken, and it is the balance and the balance only to which the party is entitled. If in this case he is entitled to the balance only he is just entitled to nothing. "All that is delivered to the creditor taking out the execution is the interest of the partner in the condition and state he had it; and nothing was due to this partner separately, the partnership being insolvent." Without referring to other cases, I may say there are one or two in *Swanston* which entirely support the same view. (a)

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Just to see how this has been in practice, I may refer to another book. I am not citing it as a leading authority, but it was cited by one of the learned counsel,—the book of Mr. *Gwynne*, who was the solicitor to the Stamp Office. I do not take the law as laid down by him, but allude to it to show what

The practice has been to pay probate duty only upon the net balance of a partnership account.

(a) See *Jackson v. Sedgwick*, 1 *Ibid.* 586.; *Alder v. Fowracre*, 3 *Ibid.* 489.
Swanston. 460.; *Crawshaw v. Maule*,
Ibid. 507.; *Shipp v. Harwood*, 2

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has been the practice, and, therefore, what the law officers of the Crown must have considered the law. If they can get anything they always do. Mr. *Gwynne* lays it down (a): "If the deceased should have been engaged at the time of his decease in any partnership, trade, or business, it will not be his share of the gross partnership property, but his portion of the net balance, as it would appear on the balance sheet, that will be chargeable with probate or administration duty." So that the executor of Mr. *Ekins* in this case will not be chargeable with probate duty or legacy duty with regard to this mare or the moiety of the mare. All he could be charged with is the balance after the accounts are made out. That shows that the practice is in conformity with what I have already stated. I am, therefore, of opinion that the property which the executor takes in this case in the county of Wilts really amounts to nothing at all. It is of no value and consequently cannot be considered *bona notabilia*.

No proof of
bona notabilia.

Upon the whole of the case, whether with reference to the paraphernalia or with reference to the partnership with Mr. *Higgins* in this mare, I am of opinion that there is no proof before me that the deceased left *bona notabilia* out of the Archdeaconry of Northamptonshire, in which he died. Therefore I must pronounce that there is no *bona notabilia*, and reject the prayer made on behalf of Mrs. *Ekins*.

Party dis-
 missed with
 costs.

Mr. *Crosse*. I pray that my party, the executor, appearing under protest, may be dismissed with costs.

THE COURT. Yes; I must give the costs.

Proctors: for the widow, *Bayford*; for the executor, *Crosse*.

(a) *Gwynne* on Probate Duty, p. 22.

COMMISSARY
 COURT OF
 SURREY.

June 7.

Alimony.
 The husband's
 income must
 be estimated
 at the amount
 of the pre-
 vious year,
 and not by an
 average of
 years.

KELLY *against* KELLY.

THIS was a suit for divorce, on the ground of cruelty, promoted by the wife against the husband.

Objection was taken to the husband's answers to the allegation of faculties, that he was bound to state his actual income during the preceding year, whereas he had given an arbitrary average with regard to one source of his income of three years, of another source of four years.

Judgment.

THE COURT (Dr. *Haggard*) held that the answers must be amended; that the proper mode of estimating the husband's income with reference to the allotment of alimony was to give the wife the benefit of the income of the previous year, inasmuch

as the husband would always, at any future period, have the power of applying to the Court for a reduction of the amount of alimony allotted if he could prove the amount of his income diminished.

Proctors: for the wife, *Nicholl*; for the husband, *Crosse*.

1854.

KELLY
against
KELLY.

Judgment.

IN THE GOODS OF JOHN GOSS, DECEASED.

THE deceased, who was master and part owner of the ship *Candahar*, made his will on the 13th of December 1841, and therein named his wife, Mary Ann Goss, universal legatee, and appointed her and A. W. Whitrong his executors. This will he deposited with Mr. Whitrong, with whom it remained until the deceased's death.

He afterwards made several voyages in his said ship, on one of which he left England in the year 1850, for *Adelaide*, whence he sailed on the homeward voyage on the 29th of December in that year, having on the previous day written an affectionate letter to his wife. On the 28th of March he arrived at *St. Helena*, without having touched at any place during the voyage, and on the same day he again wrote a letter to his wife. The ship arrived at the port of London on the 17th of May following.

Before deceased proceeded on another voyage, Mr. Whitrong proposed to return the will to him, stating that he desired to be relieved of the executorship, as he intended to leave London and reside in the country. Upon another occasion he took the will to the deceased on board ship, but the deceased refused to receive it, and said, that if that will were destroyed he should never make another. On this occasion, as well as on others of his being in England, the deceased spoke to his wife, and also to his intimate friend, Mr. Parry, about his will in the possession of Mr. Whitrong, and of his having thereby left his property to his wife, whom he always treated with great affection. Mr. Whitrong and Mr. Parry both express their conviction that the deceased would not have deceived them, but would have mentioned the fact if he had made another will.

The deceased again sailed in the month of August 1851, and died at sea on the homeward voyage on the 13th of July 1853. During the latter voyage, he several times spoke of his will to John Boyle, then mate, now master, of the *Candahar*; said he had left his property to his wife, and advised him to make his will.

On the 19th of September the intelligence of his death was

CONSISTORY
COURT OF
LONDON.

July 5.

The deceased left a will dated in 1841. After his death a paper, purporting to be a will of subsequent date, but proved by various circumstances to be a forgery, was clandestinely sent to the executor. The circumstances having been stated, and the Court asked to grant probate of the false document, not only rejected the motion, but under the circumstances decreed probate of the genuine will of 1841.

Statement.

1854.

IN THE
GEODES OF
JOHN GOSS,
Statement.

received in London, by Mr. Ridley, the other part owner of the ship; and a few days afterwards a paper writing, folded as a letter, and addressed, "Mr. A. Whitrong, care of Mr. Parry, Ludgate Hill, London," was received by Mr. Parry by the public post, bearing the Stepney post mark. On the following day Mr. Parry met Mr. Whitrong at the house of Mrs. Goss, and gave him the paper, which he opened in his presence, and found that it purported to be a will of the deceased, bearing date the 14th of February 1851.

This paper purports to bequeath all the property between the deceased's wife, his mother, brother, and sisters equally, and to appoint the wife and Mr. Anthony William Whitrong (therein called Antony only) executors; and it purports to be attested by "H. F. Archer," and "Philip Boothby."

At the period when this paper bears date, the deceased was at sea on board his ship, on the homeward voyage, and his vessel had not touched at any place between Adelaide and St. Helena. On examination of the ship's log-book and papers, and also by a list of the ship's crew and passengers, delivered to Mr. Ridley at the conclusion of the voyage, it appears that there was no person on board the ship named either "Archer," or "Boothby." This is proved by the affidavit of the mate and John Goss, a nephew of the deceased, and an apprentice on board the ship, who depose from their own knowledge that there were no such persons on board.

It appears that on the completion of a voyage, when his ship was lying in the docks, the deceased would often sign his name to blank sheets of paper, which he left with the mate or other person, for the purpose of being filled up with passes for goods or articles to be landed in his absence, so that it is not improbable that the signature to the paper writing forwarded to Mr. Ridley may have been the genuine signature of the deceased, and the paper may have been subsequently filled up by some one.

The mother of the deceased is since dead, a widow and intestate, and her eight children, the brothers and sisters of the deceased, are the only persons interested under the paper bearing date in February 1851. Of these, six have executed a proxy, declaring they will not propound the paper, and that they consent to probate of the will of 1841 being granted to the executors. The remaining two are absent from England, one having settled in Australia, the other being a seaman, sailed from Liverpool on the 25th of April last, bound for Malta and elsewhere, and has not since been heard of.

These facts were proved by the affidavits of Mrs. Goss, Mr.

Parry, Mr. Whitrong, Mr. Ridley, Mr. Boyle, and Mr. John Goss.

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IN THE
GOODS OF
JOHN GOSS.
Argument.

Dr. *Addams*, having fully stated the circumstances of the case, moved the Court to decree probate of the will of the deceased bearing date the 14th of February 1851, to be granted to Mary Goss, widow, the relict, and Anthony William (in the will written Antony) Whitrong, the executors named therein.

DR. LUSHINGTON. From the statement of the case, I apprehend that you consider this paper to be no will, and that you want probate of the will of 1841, but I cannot understand why you pray probate of this paper of 1851.

Judgment.

Dr. *Addams*. Because upon the Court rejecting this motion we can at once take out probate in common form of the will of 1841.

THE COURT. I do not see that my rejection of this motion would enable you to do that. I should presume that the Registrar would certainly refuse to grant you probate of that, knowing that there exists a later paper, which purports to be a duly signed and duly attested will of the deceased. The rejection of this motion does not pronounce that paper to be of no effect.

Dr. *Addams*. It is the ordinary practice in such cases to move for probate of the invalid paper, and on the rejection of the motion to take probate of a former will, or take out letters of administration as a matter of course.

THE COURT. Well, I should certainly think the Registrar would refuse to grant it you without the decree of the Court.

Dr. *Addams*. I don't know what the Registrar of the Consistory Court would do, but certainly the Registrars of the Prerogative Court would not hesitate to grant it. It is every day's practice. When a will is not executed according to the Wills Act, and there is evidence to that effect, the Court is nevertheless moved to grant probate of it; and on the rejection of the motion, the parties are allowed to proceed as if there were no such parties in existence.

THE COURT. That is different. In those cases there is direct evidence of a nullity; in this the nullity is only inferred from a number of suspicious circumstances. By the rejection of the motion, the Court does not pronounce the paper a nullity, but only declines, under the circumstances, to grant probate of it. The parties interested might propound it. In my opinion, all the circumstances should have been fully stated to the Court, and the Court thereupon have been moved to grant probate of the will of 1841. I have read the papers, and being satisfied in my own mind that the paper of 1851 is not genuine, I should

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IN THE
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Judgment.

be unwilling to put the widow to the expense of another motion. I shall, therefore, not merely reject this motion, but shall decree probate of the will of 1841. It is still competent to any one interested to propound the later paper if he thinks proper.

Proctor: *Heales.*

PREROGATIVE
COURT OF
CANTERBURY.

July 6.

R. P. duly executed a will prior to the 1st of January 1838, and upon the same paper a codicil subsequently thereto. He afterwards married, but survived his wife.—*Held*, that the codicil brought the will within the operation of the statute, and that both were revoked by the marriage.

IN THE GOODS OF RICHARD PUGH, DECEASED.

RICHARD PUGH, late of Walford, in the county of Hertford, died on the 29th of April 1854.

At his death ineffectual search was made among his papers for a testamentary paper. Application was then made to Mr. Church, of Bedford Row, who had formerly been his confidential solicitor. He stated that he had formerly made a will for the deceased, but could not then find it. Some days afterwards, however, he made a further search and found an envelope containing a will of the deceased, bearing date the 14th of July 1837, and also a codicil written on the same sheet of paper, and bearing date the 13th of August 1839.

The deceased was married on the 2nd of May 1840, but his wife died on the 6th of June 1851.

Dr. *Twiss* moved the Court to grant probate of the will and codicil to Charles Lewis, the surviving executor therein named.

Judgment.

SIR JOHN DODSON. I must reject this motion. It is very true that the Wills Act does not apply to wills made prior to the 1st of January 1838, and that, therefore, Sir *Herbert Jenner Fust* held, in the *Goods of Shirley (a)*, that such a will was not revoked by section 18., in consequence of the subsequent marriage of the testator; but there is a distinction in this case, for there is a codicil bearing date subsequent to the 1st of January 1838. That codicil would, of course, be subject to the operation of the Wills Act, and would, therefore, be revoked by the subsequent marriage. I am of opinion that the codicil also brings the will under the operation of the statute (*b*); for section 34. expressly provides that "every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." So that I am bound to regard the will as having been made on the 13th of August 1839, instead of the actual date of its execution, and to hold both the will and codicil to be revoked by the subsequent marriage.

Proctor: *Oldershaw.*

CUTTO *against* GILBERT.

THIS was an appeal from the Prerogative Court of Canterbury. The facts of the case, and the judgment of the Court below, have already been reported in this volume, p. 276.

Judgment was delivered by DR. LUSHINGTON. (a)

The testator in this cause is Mr. Abraham Cutto; he died on the 16th of July 1853. Upon his death a will was found bearing date August the 11th 1825, and of that will his widow, Ann Cutto, prayed probate. The probate was opposed by Mrs. Elizabeth Gilbert, the only sister of the deceased, and she alleged that the will of 1825 was revoked by a subsequent will. The learned Judge of the Court below was of opinion that such revocation had taken place, and pronounced accordingly.

The will, bearing date August the 11th 1825, and which will gave the whole of the property to the wife, and appointed her executrix, had, from the period of the execution, remained in the custody of Ann Cutto the widow. About two years before his death the deceased had said, in answer to an inquiry of his wife as to whether any confirmation or re-execution of the will was necessary, that it was perfectly valid, and did not require any such confirmation.

Upon the death of the deceased no other will was found, and it is agreed that in this state of things the mere length of time does not operate as a revocation, and probate of the will of 1825 would, if there were no other facts, have passed in common form.

Mrs. Gilbert, the sister, and only next of kin, has pleaded a revocation by the execution of a subsequent will not forthcoming, and we agree in the opinion stated at the bar, that the *onus probandi* lies on her. She must establish to our satisfaction that there is a revocation when the case is viewed with reference to all the facts connected with the subsequent will.

The first fact to be proved is, the execution of some subsequent testamentary paper, and we here think it right to observe that we are of opinion that where a revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not appearing, and where there is no draft nor instructions in writing, when in fact it is to be

(a) The Court consisted of the Rt. Hon. Sir James Parke, Dr. Lushington, Sir John Patteson, and Sir Edward Ryan.

unless the later be proved to be different from and inconsistent with the former. The contents of the later instrument are unknown, the former is not thereby revoked. In this case there is no proof whatever of the contents of the later instrument, and that, therefore, the judgment of the Court below, pronouncing the former revoked, must be reversed.

1854.

JUDICIAL
COMMITTEE
OF PRIVY
COUNCIL.

July 7.

A. C. made a will in 1825, which existed uncancelled at his death. In 1852 he duly executed another instrument, the contents of which were unknown beyond the fact of its beginning and ending with the words "last will," but it was not forthcoming at his death, and there was no evidence of its destruction. Held: 1st.

That the *onus probandi* lies upon the party setting up the later instrument to prove it revocatory of the former.

2. That, in order to revoke an existing instrument by parol evidence of the subsequent execution of another, such evidence must be strong and conclusive.

3. That the mere execution of an instrument, though called a *last will*, is not sufficient of itself to revoke a previous instrument.

4. That when the contents of the later instrument are unknown, the former is not thereby revoked.

5. That in this case there is no proof whatever of the contents of the later instrument, and that, therefore, the judgment of the Court below, pronouncing the former revoked, must be reversed.

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proved by oral evidence only, that evidence ought to be most clear; and so far we concur in the opinion which has been expressed by very learned persons, that, to revoke an existing instrument by parol evidence that another will has been executed, and by such evidence alone, though the law may admit of that course of proceeding, yet it is one attended with danger, and consequently the oral evidence produced must be strong and conclusive.

Mrs. Gilbert has pleaded that in August 1852, the testator executed his last will and testament in writing; that he revoked the will of 1825; that he intended to make provision for her and her daughters; and she has further alleged that after the execution of the will the testator declared that he had executed his will.

The evidence of these facts is to be found in the testimony of three witnesses, Mr. Watkins, Mr. Floyd, and Mr. White, who was a solicitor and friend of the deceased—the other witnesses being his clerks. The deceased himself had been a solicitor.

With respect to Mr. Thomas Watkins, the result of his evidence is, that the deceased executed some paper in his presence, and that he apprehended that it was his will—more than that he cannot say. Mr. Floyd has a better recollection of the facts. He deposes to the testator having said, “I wish you to witness my will.” Mr. Watkins can say nothing as to its being a will. Mr. Floyd says he thinks, but cannot be positive, that the paper commenced, “This is the last will and testament” of me, or some similar words, denoting the paper to be the last will of Mr. Cutto. He says: “We knew the paper to be Mr. Cutto’s will, and my impression is, and I have no doubt that I saw and read so much of it as showed it to be so, though on that point I am not able to speak from positive recollection.” Mr. White’s evidence is to the following effect: that the testator told him, “that he had just looked in to ask me to see him execute his will; but, that as I was not within, he had got two of my clerks to do so; and my impression further is, that he went on to say, in an off-hand manner, as in reference to his said will, ‘It is very short; just a few lines; just like your poor father’s;’ I rather think his expression was, ‘Just a few lines on a sheet of foolscap paper.’ My father had, as Mr. Cutto knew, made a very short will, merely leaving all his property to his wife, and appointing her sole executrix. I believe what I have just stated to be the substance of what Mr. Cutto said on the occasion. He did not produce the will to me; I cannot be positive that he used the

word, 'will,' though I think it very probable that he may have done so."

Now, what is the result of this evidence, taken in the most favourable light for the respondent? It is, that the deceased executed a paper, the only contents of which, which can be argued to be proved, are, that it concluded with the words, "This is the last will and testament of me, Abraham Cutto." It would be impossible to contend that the mere execution of a testamentary paper subsequent to the will of 1825 would be a revocation, for it might be a codicil only, or it might be a confirmation of the will, and as the *onus probandi* is on the respondent, to show that the former will was revoked, such revocation can never be established by proving the execution of a testamentary paper without something further. In fact, the question comes to this, whether, according to the evidence of Mr. Floyd, stating that the paper commenced as I have said, "This is the last will and testament," it becomes a revocation in law — such will being not forthcoming, and the other contents of the will being wholly and totally unknown.

In order to disencumber the case of the authorities we will observe that it is a case of revocation or non-revocation at the time of the execution of the paper of 1852. Some of the cases are mixed up with arguments as to the revival; but under the Statute of Wills, section 22., there can be no revival of an anterior will, except by the re-execution or a codicil duly executed. The will of 1852 remained in the custody of the deceased, and the presumption at law is, as it is not forthcoming, that he destroyed it *animo revocandi*, but the so doing cannot, since the Statute of Wills, operate in any degree as a revival of the former will. The question then is, whether, by the execution of a paper such as I have described, a revocation has been effected, and what would be the best rule to govern such cases. It is manifest the varying state of circumstances would create a wide difference. For instance, to lay down the rule that the destruction *animo revocandi* of a subsequent will will necessarily leave in force a will made thirty years before under totally different circumstances, and when all the legatees may be dead, and fresh connections have arisen—and that will would be wholly inoperative—might give effect to an instrument which would be wholly contrary to the intention of the testator. On the other hand, to say that a will destroyed *animo cancellendi* should always revoke a former instrument, might, in very many cases, leave a testator intestate whose only object in the cancellation of the last will was that the former might take effect. Leaving, therefore, the discussion of such

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difficulties as these, which would be incidental to any general rule, let us consider what is the legal authority on this question.

First, with respect to Common Law authority as to devises. Upon that we apprehend there can be no dispute, that in order to revoke a devise of real estate by a subsequent will, not appearing, it must be proved that the contents were different; but assuming for the purposes of argument that a distinction may be made between the devise of real, and the bequest of personal property, we are not called to pronounce judgment on any such case. But this, however, we must observe, with respect to the construction to be placed on the words, "This is my last will and testament," it is difficult to suppose that such words can receive one interpretation at Common Law, and a different construction in the Ecclesiastical Courts.

We will proceed, then, to consider what are the authorities bearing on this question with respect to a will of personal property, because there are authorities in civil law, and there, no doubt, it is laid down that a prior will is revoked by the execution of a subsequent one. Whether that proposition is universally true — even by the civil law — in the case of two wills of the same contents, or nearly so, it may not be necessary to inquire. The true question is, how far the doctrine of the civil law has been incorporated into the testamentary law as administered in Courts exercising jurisdiction over wills of personal estate.

The first case we have reported at length on this subject is the case of *Helyar v. Helyar*. (a) The learned Judge expressed his opinion in the following terms: "I was of opinion that the executing of a second will of a different purport was, by law, a revocation of the first, though the second does not now appear." These words deserve great consideration, for on that occasion all the authorities of the civil law, as to the revocation of a will by the execution of a subsequent one, were cited, and yet Sir *George Lee* qualified the proposition by the insertion of the words "of a different purport." Many former cases of revocation were cited, and amongst them *Whitehead v. Jennings*. (b) There it was proved that the second will appointed a different executor. Such also was the case of *Burt v. Burt*. (c) There is not a single case brought forward in which a will was held to be revoked by a Court exercising jurisdiction over wills of personal estate, by the execution of a subsequent one, the contents being wholly unknown. No such case has been cited. In the cases of *Whitehead v. Jennings* and *Burt v. Burt* the former

(a) 1 *Lee*, 511.(c) *Prerog.* 1718.

(b) Court of Delegates, 23rd of May, 1714.

wills were held to be clearly revoked by the appointment of a different executor, and that might, perhaps, be explained by a reference to the civil law, and the effect of that law in the appointment of an executor; and the fact that this circumstance wrought out the revocation is *prima facie* proof that such or similar circumstances were indispensable to revocation — that without them the mere execution of a subsequent will would not revoke. We need not further refer to the case of *Helyar v. Helyar*, because it was decided on the ground that the contents of the subsequent will were wholly different, and the evidence to that effect was supported by all the probabilities of the case.

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The case of *Moore v. Moore* (a) is so very complicated in its circumstances that no safe conclusion can be drawn from that case as to the question of law, — none, in short; but it is not correct as stated in the marginal note, that the two wills were nearly of similar import. In the one case the property was given to the two sons, and by the second will to one only; that is to say, as to the first will, to which force and efficacy was sought to be given, it was held to be revoked by the execution and cancellation of the second; but it is quite clear that the contents of the two wills were different, and different to the effect I have stated, independently of many other circumstances and facts of minor importance.

But there is a case appended in a note to *Moore v. Moore*, namely, *Passey v. Hemming* (b), in which we have the highest authority, that of Sir William Wynne, the highest authority generally considered as to testamentary law that we know of in Doctors' Commons. He makes use, according to this note, of the following words in *Passey v. Hemming*: "Now, I think, in all the cases in which it has been held that the former will was revoked by the cancellation of the latter, — in all the cases I have looked into, at least, — it appears that the intention of the deceased was varied; consequently, there was proof that he departed from the intention of the first paper." There probably is an omission of a word, he says, "revoked by the cancellation of the latter," he means by the execution and subsequent cancellation; but his meaning is sufficiently clear; he has expressed it in terms which nobody can doubt, that in all cases in which it has been held that a former will has been revoked by the execution of a subsequent will, and that will was cancelled, it appears that the contents of the two were different; that the testator had departed from the intention of the first.

(a) 1 Phill. 375.

(b) 1 Phill. 439.

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Judgment.

We will next advert to the case of *Henfrey v. Henfrey*. (a) This was simply a case of construction, whether the two papers should be taken together, or whether the latter was a revocation of the former. We see no reason to doubt the correctness of that judgment, nor can we see how that case applies to the present. There the second paper disposed of the whole of the property of the testator, and was necessarily for that reason a revocation of the former.

I will refer to one more case decided in the Ecclesiastical Courts, upon which the learned Judge in the Court below seems mainly to have founded his judgment,—the case of *Plenty v. West*. (b) Upon this case we will first observe, that the two wills were essentially different; that no executors were appointed by the first; that executors were appointed by the second; and that the only ground of argument was, that the whole of the personal estate was not disposed of by the second will. It is true, Sir *Herbert Jenner Fust*, in his judgment, relies upon the fact that the testator called the will of 1838 his last will; but that is only one circumstance in conjunction with others upon which he based his decision.

Now, let us consider how these authorities bear upon the present case. There is not one authority which lays down the proposition that the execution of a subsequent will destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in the case where a revocation has been held to be effective, there has been proof of a difference of disposition. This alone induces us to doubt the correctness of the judgment in the Court below in the case now under consideration, and it appears to us unsound. That judgment is mainly based on the evidence that the latter paper contained the words, “This is my last will and testament.” We are of opinion that these words do not import that the paper contained a different disposition of the property, and that the mere fact of calling it by such words cannot possibly render it a revocatory instrument. We think that the interpretation put upon these words by Lord *Brougham* in his judgment of *Stoddart v. Grant* (c) is the true meaning to be attributed to them. With regard to any auxiliary circumstances in this case, we think the evidence wholly fails to render any assistance to the case of the respondent.

Considering that the respondent on whom the *onus probandi* lies has failed to prove what the law requires,—the execution of a subsequent will expressly revoking the former, and of different

(a) 2 Curt. 468.

(b) 1 Rob. 264.

(c) 1 Macq. H. L. Cas. 163.

contents, — we must reverse the judgment of the Court below, and pronounce for the will propounded by Mrs. Cutto.

Dr. Haggard. The Court will grant us the costs out of the estate?

THE COURT. No; each party must pay her own costs.

Proctor: Pritchard.

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Judgment.

BROWN *against* BROWN, AND BROWN BY THEIR GUARDIAN.

PREROGATIVE
COURT OF
CANTERBURY.

May 25.

THIS was a question as to the grant of letters of administration of the goods of Joseph Brown, late of the town and county of Haverfordwest, who died intestate on the 27th of December 1853, leaving Agnes J. P. Brown, his lawful widow and relict; J. H. J. B. and J. W. B., his natural lawful and only children, who were infants.

J. B. died, leaving a widow, from whom he had separated on suspicion of her adultery, and two infant children, whom, during his life, he had left under her charge. The grandfather, on behalf of the infants, opposed the widow, and prayed the Court to grant the administration to him until one of the children should come of age. Under the circumstances the Court decreed it to the widow, but gave the grandfather's costs out of the estate.

The grant of letters of administration to the widow was opposed by John Brown, the grandfather and guardian lawfully assigned to the said infants.

He alleged, in an act on petition, *that* the deceased married in August 1848, and lived happily with his wife, A. J. P. B. (by whom he had two children, J. H. J. B. and J. W. B.), until July 1852, when she formed an adulterous intercourse with W. C., one of his assistants; *that* deceased instructed his solicitor to prepare a deed of separation; *that*, pending the instructions and execution of such deed, the said A. J. P. B. called upon the deceased's solicitor, admitted her guilt, and begged the solicitor to intercede with her husband for her, in order that he should again live with her, which he had ceased to do; *that* the deceased refused, and in the month of October 1852, the said deed of separation was executed, whereby he agreed to allow his wife thirty shillings a week, and to allow the children (on account of their infancy, and by reason that he, from the nature of his business, had no settled place of residence) to remain with her; *that* the infidelity of his wife greatly preyed upon his mind, and *that* in consequence thereof he, on the 29th of December 1853, committed suicide by drowning himself, having on the previous day written to his brother, James Brown, informing him of his state of mind, and begging him, in the event of his death, to see after and protect his children. The prayer was, that the letters of administration be granted to the guardian for the use and benefit of the infants, and until one of them should attain the age of twenty-one years.

Pleadings.

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Pleadings.

The answer on behalf of the widow, neither admitting nor denying the allegations respecting the adultery, admitted the separation, and alleged *that* she consented to such separation from fear of the violent and strange conduct of the deceased; *that* at the time the deceased committed suicide, he was, as he had been for some time previously, in an unsound state of mind; and *that* such suicide was not attributable to the infidelity of his wife preying on his mind; *that* during his lifetime deceased always allowed his children to remain under the care and protection of their mother, who, at the time of their separation, went with the children to the residence of her mother, and had ever since continued to reside with her; *that* since the deceased's death the said widow has received letters (annexed) of kindness from the various relatives of the deceased.

Argument.

Dr. *Deane*, for the guardian of the infants, contended that it was an established rule of the Court not to grant the administration to an adulterous wife, and that in the present case there was sufficient evidence of guilt to bar the widow's claim. At all events, it was clear that, whether guilty or not, the deceased considered her to be guilty. The Court, in the exercise of its discretion, would therefore rather grant the administration to the grandfather and guardian of the children. He cited *Lambell v. Lambell* (a), and *Chapple v. Chapple* (b), and *Conyers v. Kilson*. (c)

Dr. *Bayford*, for the widow, argued to the same effect as the judgment of the Court.

Judgment.

The facts of
the case.

SIR J. DODSON. This is a question as to the grant of letters of administration of the effects of Mr. Joseph Brown, deceased. One of the parties applying to the Court for the grant is the widow of the deceased, the other is the grandfather of his infant children.

It appears that the deceased lived happily with his wife from the time of their marriage in 1848, down to the month of July 1852, and during that time had two children who are now both under three years old. The deceased was a travelling mercer, and in the course of his business was, in the year 1852, accompanied by his wife to Ireland. It was upon that occasion that disputes first arose between them; circumstances occurred which at least excited his suspicions, and induced him to charge his wife with adultery with his assistant in his business.

Mr. Brown, whatever ground he may have had for his suspicions, continued to live with his wife until they returned to England; that conduct on his part would clearly amount to

(a) 3 Hagg. Ecc. 568.

(b) 3 Curt. 429.

(c) 3 Hagg. Ecc. 556.

Whatever
grounds the
deceased had
for suspicion,
he condoned
the offence.

condonation at the time, and I do not find that he ever commenced or ever contemplated a suit for divorce.

Upon their return to England, however, a deed of separation was executed, by which it was agreed that Mrs. Brown should receive an allowance for herself and children, and that they should continue under her charge. Mrs. Brown, on leaving her husband, went immediately to the residence of her mother, with whom she has continued to reside down to the present time.

It is said by the grandfather that his son separated from his wife on the ground of adultery, and that that is a sufficient reason for the Court in the exercise of its discretion to refuse to commit the administration of his effects to her. It is said, moreover, that the charge is not now denied, but undoubtedly there is no distinct admission of it; and I apprehend that, being a criminal charge, she had a right to put the accuser to the proof. It is certainly a case of suspicion; but the Court should, in my opinion, have the clearest proof, or at least stronger proof than the present, of the adultery, before it departs from its ordinary practice as to the grant of letters of administration.

It is admitted to be entirely discretionary with the Court, and the question is, whether, looking at all the circumstances of the case as proved on both sides, I ought to reject the application of the widow, and commit the administration to the grandfather and guardian of the children.

Now, it appears that the deceased himself entrusted his infant children to her care, and that she then went to reside with her mother. It is, moreover, expressly sworn, that she has conducted herself well since that period, whatever may have been her conduct antecedently. Here are letters which speak of her in very high terms, which by no means justify the inference that she is a person unfit to be trusted with the administration of the deceased's effects. One from the deceased's sister after his death, in which she begs her not to give way too much to her feelings of grief, but to rouse herself for the sake of her children, and expresses the "profoundest respect" towards her. It then contains this passage: "Now, my dear Mrs. Brown, concerning the goods, father has had them sealed, and are quite safe until the time when a settlement takes place for you and your dear children." Now, this letter was written by desire of the grandfather who is now opposing this grant; but it certainly does not appear to me that at the time that letter was written the widow was considered an improper person to be entrusted with the administration of the deceased's effects; on the contrary, I think such a proceeding was con-

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against
Brown.*

Judgment.

He also gave his wife a separate allowance, and agreed to leave the children under her care.

The charge of adultery is not proved so as to justify the Court in a departure from its ordinary practice.

The grant is in the discretion of the Court upon a review of the whole circumstances.

The evidence shows the widow to be a very fit and proper person to have the grant.

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The cases cited are not sufficiently similar in their circumstances to induce the Court to refuse this grant to the widow. *Lambell v. Lambell*.

Conyers v. Kitson.

Chappell v. Chappell.

templated, and that the deceased's family were taking the necessary steps to forward it. That letter is dated on the 9th of January 1854, and upon the 29th the grandfather himself writes an affectionate letter to the widow, in the postscript to which, as I understand it, he expressly says that if his son (the deceased) had slept with them one day, they had determined to make an attempt to bring about a reconciliation for the deceased and his wife to live together again.

Now, under these circumstances, ought I to take away the administration of the deceased's effects from his widow? I say take away, because, according to the ordinary practice of this Court, she is considered to have a prior right to it. In support of his argument to that effect, the learned counsel cited the case of *Lambell v. Lambell* (a), but this was a question with respect to the will of the deceased being found in his repositories with the seal torn off, and not as to the right to the administration. On application being subsequently made to the Court for the grant to pass to the widow, the Court observed, "The grant is discretionary; and as the widow lived separate, I decree it to the brother." But it does not at all appear under what particular circumstances the deceased was living separate from his wife, and it must be remembered that the brother had an equal interest with the widow. I think there is nothing in that case.

Conyers v. Kitson (b) was also referred to. In that case there was a contest for the administration, and the Court granted it to the sister in preference to the widow, whom he condemned in costs. The circumstances, however, of that case were entirely different from the present; the widow had, during her husband's lifetime been living with, and had in fact been married to another man. The Court, of course, refused to commit the administration to the widow.

The case of *Chappell* against *Chappell* (c) was also cited. In that case the deceased died, leaving a widow, a brother, two nephews, and two nieces, the children of a deceased sister. The brother opposed the grant to the widow, against whom various objections were urged; but that case was very different from the present, in which the widow has been described by the relatives themselves in very favourable terms indeed. In that case the Court said, "I think I ought to exercise my discretion in favour of the brother, in order to protect the interests of the children (the nephews and nieces), and ought not to leave the widow in possession of their shares of the money for so long a time as must intervene between the grant and the payment to the minors; it is chiefly in reference to this circumstance that

(a) 3 Hagg. Ecc. 570. (b) 3 Hagg. Ecc. 556. (c) 3 Curt. 429.

the Court so decides; for I do not mean to say that otherwise there is sufficient reason for refusing to entrust the widow with the management of this property." Yet Mrs. Chappell was not only separated from her husband, but had actually married again during her husband's lifetime.

I do not think there is in the present case sufficient reason for refusing to entrust the widow with the management of the property. There are no other interests but the widow's and children's, and these children are the children of the widow, were intrusted to her care by the deceased himself, and have continued under her care up to the present time. She seems to be a fit and proper person, not only from the letters of the relatives, but from the affidavit of Mr. *Lane*, the solicitor, who swears to his belief "that she is a fit and proper person to become administratrix, and to have the care and charge of the infant children of the deceased, by reason that she is an affectionate mother, a woman of education, and of domestic habits."

It is in the discretion of the Court; and I do not think, looking at all the circumstances of the case, that it is one in which I should depart from the usual course. I therefore decree the administration to the widow.

Dr. Deane. The Court will give us our costs out of the estate?

Dr. Bayford. I trust not, Sir. That would be, in effect, condemning us in the costs, though the Court decides in our favour. After the letters of the relatives, upon which the Court has commented, this opposition to the grant was most unjustifiable, and its expenses ought not to be thrown either upon the widow or the children.

THE COURT. I cannot take that view of it. I am of opinion that there was some ground for the opposition, which was intended for the benefit of the children; and I do not think that I should burden the guardian with the costs. I decree the costs out of the estate, and direct that the sureties justify.

Proctors: for the guardian, *Toker*; for the widow, *Lawrie*.

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Judgment.

There were no interests concerned but the widow's and children's.

It is not a case for a departure from the ordinary practice.

The opposition being made for the sake of the children, the grandfather is entitled to his costs out of the estate.

—♦—
"THE TELEGRAPH."
VALENTINE v. CLEUGH.

THE HIGH
COURT OF
ADMIRALTY,
AND PRIVY
COUNCIL.

THIS was a suit for damage, by collision, brought by the owners of the barque "Palermo" against the steam-ship "Telegraph" belonging to the Belfast Steam Ship Company.

May 18.
A vessel lying at anchor in a roadstead exhibited a

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light in her mizen rigging instead of at her mast head. Held, in the Admiralty Court, that under the circumstances the light would be as visible in that place, and that therefore the collision could not have been occasioned by the deviation from the literal requirements of the Admiralty order; but reversed on appeal to the Privy Council, which held that the light was not as visible—that the deviation from the Admiralty order occasioned the collision, and that therefore the vessel proceeding was barred of recovery, and must be condemned in the costs of both Courts.

Pleadings.

The act, on petition, alleged that the "Palermo," on a voyage from Liverpool to Genoa, was driven, by stress of weather, into Belfast Lough, and was brought to anchor in the roadstead therein, about midway between Carrickfergus and Grey Point, at about 8 p. m. of the 29th of November 1853. That at such time it was about high water, the night was clear, with a light breeze, and a bright signal lanthorn was hoisted and secured in her mizen rigging, and that the light in the said lanthorn was burning brightly, so as to be visible all round, and so continued until and at the time of the collision, &c.

The answer, *inter alia*, alleged that as well before as at the time of and after the collision, the lights of the steam-ship were burning brightly, and such lights would have been seen, on the night in question, at the distance of more than a mile; that no light whatever was burning at the mast head of the other vessel with which the steam-ship came in contact, as there should have been, pursuant to the Admiralty order of the 1st of May 1852, which, if there had been, it could and would have been seen from the steam-ship in time to have prevented the collision; and denied that any light was burning on the mizen rigging of the vessel with which the steam-ship so came in contact; and expressly alleged that such collision was solely owing to the neglect of some of those on board the barque in not having exhibited a proper light, or in having permitted the same to go out, anchored as such vessel was in the direct course of ships proceeding from Belfast. In reply, it was denied, on behalf of the "Palermo," that if the light of the "Palermo" had been at the mast head, it could and would have been seen from the steam-ship in time to have prevented the collision; and, on the contrary, it was alleged that, riding as the "Palermo" was, the mizen rigging to which the said light was attached and burning brightly at the time of the collision, was the best position for enabling those on board the steam-ship to see the light and keep clear of the barque.

This was denied in the rejoinder.

Dr. Haggard and Dr. R. J. Phillimore appeared for the "Palermo," Dr. Addams and Dr. Dasent for the "Telegraph."

Summing-up.

A vessel at anchor must prove, in cases of collision, that she was properly anchored, and had complied substantially

DR. LUSHINGTON, addressing the Elder Brethren (a), said:

Gentlemen, it may be convenient, before I advert to the particular circumstances of this case, to point out to you what are the rules of law with respect to cases of collision with ships that are lying at anchor, and that I can do in a very few words. Where a suit is brought by the owners of a vessel lying at

(a) Captain Nelson and Captain Weare.

anchor in a fairway or roadstead at the time of the collision, it must be proved, in the first instance, on behalf of such a ship, that she was anchored in a proper place, and a proper manner; and if the collision took place at night, it must further be proved, as now settled, that she has substantially complied with the requisitions of the Act of Parliament in regard to the hoisting of a light. It is indispensable that these positions should be established at the commencement of such a suit, and when these are proved, in any particular case, then the burden of proof shifts, and it lies upon the ship against which the action is brought, whether a steamer or a sailing-vessel, to show under what circumstances, or how it was, that the collision with a vessel so lying at anchor took place. This rule is obviously founded upon principles of good sense, because a vessel lying at anchor is naturally and necessarily incompetent to take any measures to avoid collision, beyond that of making known to other vessels in her vicinity the position in which she is lying. If she places herself in a proper position, and makes that position sufficiently known, then it is the duty of all vessels, either steamers or sailing-vessels, proceeding in the neighbourhood of such vessel, to avoid coming into collision with her.

These are general principles of law, which I apprehend to be perfectly undoubted. Let us now proceed to consider the particular circumstances of the case before us, and in so doing, let us, in the first instance, lay aside all questions which have been discussed in argument on the one side and on the other, which are not necessary for us to consider, or even proper, perhaps, to take into consideration at all.

It is to be observed that those who have brought forward the case of the "Palermo" have not alleged that the "Telegraph" was going at an undue speed; they make no averment of that kind; they have contented themselves with stating the manner in which the collision took place, and there is no charge that she was going at undue speed. It appears to me, therefore, that we need not consider with any particularity the rate at which the "Telegraph" was sailing, but it must be presumed that she was going at her ordinary speed.

Again, with respect to the course which the "Telegraph" was pursuing at the time. I apprehend, as it is not stated that she was out of her proper course, it is to be assumed that no culpability attaches to her in this respect. It certainly was the duty of the parties proceeding in the cause, if it were intended to bring forward any such question on the present occasion, to state it clearly and with precision, but this has not been done at all.

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with the regulations respecting lights. The *onus probandi* then shifts.

There is no averment that the steamer was going at an undue speed,

or was pursuing an improper course.

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The sole question is, whether or not the "Palermo" had a proper light hoisted. She certainly had not complied *literally* with the regulations.

If such non-compliance occasioned the collision, she is by the statute barred of recovery for the damage sustained thereby.

The question is, the degree of visibility of lights in different positions. If a light in the mizen rigging be not so

This narrows the whole matter to what I am now about to bring under your attention. I apprehend the "Palermo" was, at the time in question, lying at anchor in a proper place, and was properly anchored, so far as appears. That I apprehend to be a position which is not contradicted on the present occasion; but the main controversy, the great point which I shall have to submit to you is, whether she had or had not a proper light hoisted.

Now, gentlemen, it is perfectly clear, indeed it is admitted on all sides, that she has not literally complied with the provisions of the Act of Parliament, because the provisions of the Act of Parliament are in the following words: — "All sailing-vessels at anchor in roadsteads or fairways shall be bound to exhibit, between sunset and sunrise, a constant bright light at the mast head. Whatever might have been the light which the "Palermo" carried, it is admitted that she had no light at the mast head. Then we must look to see, first, what are the legal consequences of not having literally complied with the statute and the regulations made. The legal consequences are these; without reading them in the precise words of the provisions of the Act of Parliament, and I only omit to do it because you are so familiar with them, and I have so repeatedly had occasion to bring them under the notice of the Trinity Masters; the legal consequences, in substance, are these, *vide licet*, that a neglect to comply literally with the directions of the Lords Commissioners of the Admiralty by not hoisting a bright light at the mast head, shall preclude the parties guilty of such neglect from recovering the loss sustained in any collision where it shall appear that such collision was occasioned by the non-observance of that rule; and that brings the case back to this short point, whether you are of opinion that the omitting to hoist a light at the mast head was the occasion of this collision.

Gentlemen, looking to the evidence, I am satisfied in my own mind, but it is for you to determine it, that there was a light hoisted on board the "Palermo" at the time the pilot quitted. That such light was hoisted, according to all the evidence, in the larboard mizen rigging, and that the light continued to burn at the larboard mizen rigging at the time of the collision.

Now, that being so, the question resolves itself into the degree of visibility, if I may use that expression, between a light hoisted at the mast head and one hoisted eighteen feet above deck, on the larboard mizen rigging. The solution of this question must depend on considerations which particularly belong to you as relates to this particular case, because you are

best capable of judging whether this vessel, the "Telegraph," proceeding from the port of Belfast, would be able to descry a vessel with the same facility, with a light hoisted at the larboard mizen rigging, as she would if it had been at the mast head. If you are of opinion that she would not, then I cannot help thinking that this collision might have been avoided by hoisting a light at the mast head, and that it is fairly to be inferred that the collision was occasioned in consequence of its not being so hoisted. On the other hand, if your nautical knowledge leads you to the conclusion that, in all probability, the light would be equally discerned at the larboard mizen rigging and at the mast head, then, under these circumstances, it appears it would be impossible to say that the collision was occasioned by a disregard of the terms of the Act of Parliament.

I do not know that I can possibly put the question to you in a stronger and clearer light than I have put it. You have the evidence on the one side as to the light burning brightly, so that it could be seen at a distance; on the other hand, evidence of most respectable persons on board the steamer, who can swear — not to the fact, all they can swear to is their belief — that if the light had been at the mast head, they must have discerned it; and they also swear that they did not see the light.

Now, gentlemen, these are the points on which I wish to have your opinion, and if you are desirous we will retire together and consider them.

On returning into Court, after conferring with the Trinity Masters, DR. LUSHINGTON said: —

The Trinity Masters are of opinion, looking at all the circumstances of the case, that a light hoisted in the larboard mizen rigging was as visible as if it were at the mast head. They say, moreover, that if any comparison is to be drawn between the two positions, they think all the circumstances of this case show it would be more visible at the larboard mizen rigging, than it would have been at the mast head. Therefore I pronounce for the damage.

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visible as at
the mast head,
the legal in-
ference is that
the collision
was occa-
sioned by the
deviation from
the rule.

Judgment.

The light in
the mizen
rigging was
as visible as
at the mast
head, and the
"Palermo,"
therefore, is
not barred of
her recovery.

Against this judgment the "Telegraph" appealed. The case, under the name *Valentine and Others* against *Cleugh*, was argued before the Privy Council (a), by

Dr. Addams and Mr. Forsyth for the appellant.

Dr. Haggard and Mr. Willes for the respondent.

Appeal.

(a) Present the Rt. Hon. Sir J. Dodson, and the Rt. Hon. Sir E. Patteson, the Rt. Hon. Sir John Ryan, assisted by sailing masters.

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*Judgment on
Appeal.*

The discrepancies between the opposing witnesses do not necessarily show wilful falsehood on the one side or the other, for they may be accounted for.

Various points were disposed of in the Court below.

No blame attaches to the "Palermo" for her anchorage, nor to the "Telegraph" for her speed or course.

The sole question respects the lights exhibited by the "Palermo."

The discrepancy between the witnesses may be easily accounted for.

SIR J. PATTESON delivered the judgment of the Court. This is a question decided originally in the Court of Admiralty, with respect to the damage sustained by the barque "Palermo," in consequence of the steamer "Telegraph" having struck her stern, as she lay at anchor, and done her considerable damage."

Many witnesses have been examined on both sides, and there are the usual discrepancies appearing in their evidence, probably not from anything like an intention on the part of the witnesses not to speak the truth, but from the bias which they naturally all feel, both on the one side and on the other, to state the facts favourably to their own party. Many points apparently might have arisen in the course of giving that evidence, besides the one upon which the decision ultimately went; but all those points, whatever they were, which might have arisen, have been disposed of by the learned Judge in the Court below, in his address to the Trinity Masters. We are very glad they were so disposed of, and we quite agree with him in the view which he took with respect to those points, and with respect to the general law which he laid down on the subject.

It appears to be quite clear, according to the evidence, and according to the opinion expressed by the learned Judge himself, in addressing the Trinity Masters, that the "Palermo" was anchored in a proper place on the night in question. It appears, also, that the steamer was proceeding from Belfast to Liverpool in her proper course; that her steering was proper, and her speed such as was right and proper. Therefore, there was nothing wrong done by the owners of the "Palermo," with respect to anchoring; and nothing wrong done by the owners of the steamer, with respect to the course she was pursuing, or the speed at which she was going; but the whole question turns upon the position of the light that was exhibited, if any light were exhibited, by the "Palermo."

Now doubtless many of the witnesses for the "Telegraph" say there was no light at all exhibited by the "Palermo." One can easily understand their saying so; if in truth they did not see the light, they would say there was none. But it does not follow that there should be no light because they did not see it. The light may have been placed in such a position that they were not able to see it. But it is positively sworn by the persons on board the "Palermo," that there was a light in the larboard mizen rigging, which was put there as soon as she came to anchor, remained there an hour and a half before and until after the collision took place, and continued burning brightly as before.

There are other questions as to the state of the weather, upon

which the witnesses seem not to agree. Some say that it was rainy, some that it was hazy; and other witnesses say that lights could be seen all through the night wherever they were exhibited. It is sworn that the steamer passed some thirty vessels that exhibited lights, and she did not strike any of them. It is admitted that the state of the night was such that lights could be seen to a considerable distance, whether to such a distance as on a clear dark night, as it is called, is another question; but still they were seen to a considerable distance.

All that is cleared away; and we now come to the question raised on the Act of Parliament, 14 & 15 Vict. c. 79., and to the regulations of the Lords of the Admiralty, which were made in pursuance of the Act, and which, by virtue of the Act, have the force of an Act of Parliament, because it is expressly said that the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, may make regulations for lights, and that all such regulations shall continue in force until they be revoked. The 27th section regards vessels passing each other where both are in motion; therefore, that need not be adverted to. Then comes the 28th section, which says, "If in any case of a collision between two or more vessels, it appear that such collision was occasioned by the nonobservance either of the foregoing rules with respect to the passing of steamers, or of the rules to be made as aforesaid by the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, with respect to the exhibition of lights, the owner of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel in such collision, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule." Now, here the circumstances of the case do not appear to be such as to justify a departure from the rule. In the Court below, on the part of the "Palermo," no reason was given why the regulations were not strictly and literally complied with; to this I shall advert again presently. They do not say there were such circumstances as justified a departure from the regulations; they do not put it on that ground at all.

The section then goes on, "And in case any damage to person or property be sustained in consequence of the nonobservance of any of the said rules, the same shall in all courts of justice be deemed, in the absence of proof to the contrary, to have been occasioned by the wilful default of the master, or the person having the charge of such vessel; and such master or

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*Judgment
on Appeal.*

Construction
of the 14 & 15
Vict. c. 79.
s. 27.

No reason
given by the
"Palermo"
why the Ad-
miralty order
was not
strictly ad-
hered to.

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*Judgment
on Appeal.*

other person shall, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule, be subject in all proceedings, whether civil or criminal, to the legal consequences of such default." Here, therefore, it is perfectly clear that if the regulations which are put forth by the commissioners of the Admiralty are not literally complied with, and any collision takes place, and damage occurs, which is attributable to departure from the regulations, and not under justifiable circumstances, the party who has so departed from the regulations cannot recover; supposing always that the damage arises from that departure.

There is no ambiguity in the Admiralty order, unless in the words "at the mast head."

Then we have the Lords of the Admiralty making a regulation; and it is upon that that the case really turns. It distinctly says, "all sailing-vessels"—the "Palermo" was a sailing-vessel—"at anchor"—she was at anchor,— "in roadsteads or fairways, shall be also bound to exhibit between sunset and sunrise a constant bright light at the mast head, except within harbours or other places where regulations for other lights for ships are legally established." Then it goes on to say: "The lantern to be used when at anchor, both by steam-vessels and sailing-vessels, to be so constructed as to show a clear good light all round the horizon." This is perfectly plain, except there be any difficulty with respect to what is meant by "at the mast head." It does not say at what mast head, whether foremast, or mainmast, or mizenmast; but simply, "at the mast head." Now, in the course of this discussion, it seemed to be somewhat assumed, we thought, that the words "at the mast head" referred to the first mast,—perhaps I do not express myself nautically,—and might mean, on or attached to the mast. If that were so, it is obvious that putting a light against the mast, whether on the one side or the other, must necessarily prevent the light being seen all round; it would be dark on the other side of the mast. It seemed to us very extraordinary that that should really be the meaning of "mast head." Upon consulting the gentlemen whose assistance we have, they were kind enough to tell us what seems to be the meaning; and, looking ourselves at the words, "the lantern shall show a clear good light all round the horizon," we are clearly of opinion that "at the mast head," means "at the very top;" that if the topgallant mast be standing, it must be at the topgallant mast,— whichever is the standing mast, that is the mast. We do not mean one of the three masts as compared with the other masts of the vessel; perhaps there is a choice as to the mast. There is no difficulty in doing this. There are halyards by which it is

It seems optional whether the light should be on the foremast, mainmast, or mizenmast, but "at the mast head" means at the top of the topgallant mast, if that be standing, and not merely against the mast.

easier to run a light to the top than to put it against the mast. Now, if the lantern were at the very top it would show a light all round the horizon. It is conceded by the respondent, that those who had charge of the "Palermo" did not literally comply with the regulation; they did not hoist a constant bright light at any mast head at all; but they hoisted a light on the mizen rigging; and so far it is quite plain that they departed from the literal meaning of the Act of Parliament, and the regulations of the Admiralty. As we have already said, the respondent has not assigned any specific reason to justify the departure from these regulations, and the case is not put upon that ground; but it is very justly, and most fairly and properly put in the address by the learned Judge to the Trinity Masters: "Whether you are of opinion, that the omitting to hoist a light at the mast head was the occasion of this collision." The learned Judge goes on to say, "The solution of this question must depend on considerations which particularly belong to you," (speaking to the Trinity Masters who assisted him), as relates to this particular case, because you are best capable of judging whether this vessel the 'Telegraph,' proceeding from the port of Belfast, would be able to descry a vessel with the same facility with a light hoisted in the larboard mizen rigging, as she would if it had been at the mast head." The "Palermo" was anchored, be it observed, with her head to the south, about S. S. E., or thereabouts, and the wind was blowing against her head; the proper course of the steamer being E. by N., she would come on the starboard side of the vessel, this light being in the larboard mizen rigging. We do not think there could be a mistake in the Court below with respect to the steamer coming on the larboard side, and not on the starboard, because the evidence is so clear as to these points. But the learned Judge goes on to say, "If you are of opinion that she would not,"—that is, not see the light so well as if it were placed at the mast head,—"then I cannot help thinking that this collision might have been avoided by hoisting a light at the mast head; and that it is fairly to be inferred that the collision was occasioned in consequence of its not being so hoisted." Now, we think that inference very fair and very right and proper; because, there being express regulations of the Admiralty, that lights are to be hoisted at the mast head, if you will, of your own authority, and without justifiable reason, depart from the regulations, and put a light somewhere else, it ought to be at your own risk. The consequence of making nice distinctions in every case that arose

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 "TELEGRAPH."
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The question was fairly and properly put to the Trinity Masters by the Judge of the Court below.

If the light were placed in a part of the vessel where it could not be seen so well as if it had been placed at the mast head, the legal inference would be that the deviation from the Admiralty rule occasioned the collision, though

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on Appeal.*

deviation from
the rule is of
itself no bar
to recovery,
unless the
collision was
occasioned by
such deviation.

would be in a great measure to do away with the Act of Parliament, and the regulations founded upon it.

Now, as admitted in argument, it is not departure from the regulations which would preclude a vessel from recovering altogether, unless that was the occasion of the collision. It might be a light night, so that a vessel could be seen without a light, or there might be misconduct on the part of the other vessel; and in these and a hundred other cases that might be put, the party would be entitled to recover (a), although the regulations had not been complied with. Clearly the collision must be traced to a departure from the regulations; but it is our desire that it should be understood that those who depart from them, do it at their own peril.

The learned Judge goes on to say, "On the other hand, if your nautical knowledge lead you to the conclusion that, in all probability, the light would be equally discerned in the larboard mizen rigging and at the mast head, then, under these circumstances, it appears it would be impossible to say that the collision was occasioned by a disregard of the terms of the Act of Parliament." Now, nothing can be fairer than that way of putting it; and it really is reduced to this simple question, whether the Trinity Masters and the learned Judge, who acquiesced in their view, are right in the opinion at which they arrived, because the whole case turns on that. "The Trinity Masters," the learned Judge said, "are of opinion, looking at all the circumstances of the case, that a light hoisted in the larboard mizen rigging was as visible as if it were at the mast head."

No doubt it might be as visible to persons on the larboard side of the vessel; but was it as visible to all persons? is the question. He then proceeds: "They say, moreover, that if any comparison is to be drawn between the two positions, they think all the circumstances of this case show it would be more visible in the larboard mizen rigging than it would have been at the mast head." Their Lordships are in very great

(a) It is apprehended that it is not the intention of the Court to lay it down that in all cases where there is misconduct on the part of the vessel proceeded against, the vessel proceeding would be freed from the statute consequences of her disobedience to the Admiralty regulations, but merely that she would not be liable to those consequences when the misconduct of the vessel proceeded against *wholly occasioned* the collision. Otherwise this deci-

sion would, in effect, overrule the decision of the Admiralty Court in the "*Aliwal*," 1 Ecc. & Adm. Rep. 96. and the "*Wanfell*," 1 Ecc. & Adm. Rep. 269., for in both those cases the Court held that there was misconduct on the part of the vessels proceeded against, but that as the collision was in part occasioned by the nonobedience to the Act of Parliament or the Admiralty rules on the part of the vessel proceeding, she could not recover.

difficulty to understand how they arrived at that conclusion. How it could possibly be said to be more visible, we are really quite unable to conjecture.

We have had the advantage of being assisted by gentlemen fully conversant with matters of this sort, who are clearly of opinion, as their Lordships are clearly of opinion, that the Trinity Masters were entirely wrong in their view of the case. The question turns simply upon whether or not the steamer, coming as she did, would be able to descry the vessel with the same facility with the light hoisted in the larboard mizen rigging, as she would if it had been at the mast head. The Trinity Masters — and the learned Judge adopted their decision — have determined that she would be able to do it. The Sailing Masters who assist us entertain a totally different and opposite opinion; and in their view we concur, as we think she certainly could not. Here is the light in the mizen rigging; here is the steam-vessel coming up, and no doubt the mizen-mast, and the sail that was brailled up, and various other things, might very likely have hidden the light from view; but if it had been at the top of the mast it could not have been hidden. Therefore we cannot see, looking at it as ordinary men and not practical men, how there can be the slightest doubt on the question; and we are assisted by nautical men, who take the same view of the case.

We are clearly of opinion that the view taken by the Trinity Masters is not a just and proper view; but that the light was in all probability hidden by the position in which it was placed; at the mast head it might, and in all probability would, have been seen. Be it observed, there was a good look-out on board the steamer, which fact is not denied. It is admitted they had seen a great many vessels — there was a cautious look-out; and therefore, it is fairly and properly to be assumed (indeed, from the facts of the case it is quite apparent) that this collision was occasioned by a breach of the regulations, in not placing the light at the mast head. That being so, by the Act of Parliament the owners of the “Palermo” are not entitled to recover.

Their Lordships are of opinion that the decree and sentence of the Court below must be reversed and the cause retained; and that the owners of the “Palermo” must be condemned in the costs below as well as here. The unsuccessful party must take the consequences of bringing an action which he cannot sustain. We shall advise her Majesty accordingly.

Proctors: for the “Palermo,” *Stokes*; for the “Telegraph,” *Bathurst*.

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“TELEGRAPH.”VALENTINE
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The light in the mizen rigging could not be as visible as a light at the mast head.

There was a good look-out on board the steamer, and, therefore, it must be assumed that the collision was occasioned by the breach of the Admiralty rule.

The “Palermo,” therefore, cannot recover, and must be condemned in the costs in both Courts.

Judgment reversed.

1854.

THE HIGH
COURT OF
ADMIRALTY.

July 31.

The master of a Belgian steamer, plying constantly between Ghent and London, employed an engineer in London to do some repairs, and to supply him with a new screw propeller,—
Held, 1st, that the Court had jurisdiction under the statute, as whatever was necessary to put the machinery of a passenger steam-ship in the best working order was a “necessary” within the meaning of the Act. 2ndly, that where no special contract was proved, the purchaser takes at his own risk.

Pleadings.

THE “FLECHA.”

THIS was a suit for necessities brought by Mr. William Bache, of Bermondsey, engineer and millwright, against the foreign steam-ship “Flecha.” The amount claimed was 87*l.* 14*s.* 6*d.* A tender of 15*l.* 2*s.* for certain repairs was made and rejected. The dispute was respecting the terms upon which two propellers had been supplied.

The act on petition alleged *that*, in pursuance of the orders of H. Seenwen, the master of the Belgian screw-vessel “Flecha,” Mr. Bache did, in the month of August 1853, and the five following months, furnish certain articles, and perform certain reparations, to the said ship while in the river Thames, amounting in value to the sum of 87*l.* 14*s.* 6*d.*, to wit, &c. : “November 16. To a new propeller, and fixing the same, with keys, 40*l.* January 26. To altering pattern of propeller, and a new propeller, fitted with keys, &c., 35*l.*” &c. ; *that* application was duly made to the said master for payment; but *that* he hath refused, and still refuses to pay the same.

The answer alleged *that* in November last, James Lowe, the patentee of a certain new screw propeller came on board the “Flecha,” with Mr. Bache, and after representing to the master the merits thereof, stated that by adopting the same the vessel would be enabled to make two knots per hour more than could be obtained from the one she had then in use, and with a less consumption of fuel; *that* in answer to the master’s inquiry, Mr. Lowe stated the cost of such a screw would be 40*l.*; *that* it was also distinctly agreed that if the screw did not answer the purposes intended no charge whatever was to be made for the same; *that* on these conditions, and for the sum aforesaid, a screw on Mr. Lowe’s patent was ordered by the master; *that* in the month of November the screw was fixed, but on trial to Ghent and back the same was found to be wholly ineffectual, and the patentee, Mr. Lowe, having again come on board with Mr. Bache, they both at once declared they saw how and where they had made a mistake in the construction of the screw, and prevailed on the master to allow them to make a second screw, whereby they engaged to remedy the mistake made in the first; *that* they accordingly took away the first screw, which they retained, and still retain; *that* in January 1854, they furnished the second screw; but *that* it was found upon trial to be quite as defective and useless as the first; *that* upon both trials it was found that instead of the new screws accelerating the speed of the “Flecha,” she lost six hours in a passage usually performed

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 {
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 "FLECHA."
 Readings.

in about twenty; *that* in consequence of such defect the screw had to be unshipped, and the original screw of the vessel replaced; *that* since that time the "Flecha" has been working with her said original screw, until the week preceding the giving in the plea, when it was replaced by a new screw made in Ghent; *that* after the failure of the second screw Mr. Bache was requested by letter to fetch the same away, but as he took no notice thereof, the said useless screw was landed on Mr. Cotton's wharf, Bermondsey, near the premises of Mr. Bache, where the same now remains, the said Mr. Bache, although duly informed thereof, having neglected to take the same away; *that* during the whole time the negotiations and trials aforesaid were going on, the master of the "Flecha" was led to believe that he was treating with Mr. Lowe, the patentee; *that* he made no engagement whatever with Mr. Bache with regard to the said screw; but *that* Mr. Bache took his instructions relative thereto from Mr. Lowe, as he had previously done for a screw furnished by a Mr. Rankin, which, like Mr. Lowe's, turned out a failure, but for which no charge was claimed. *That* in reference to the other items, &c.

That the "Flecha" is a vessel going and returning every fourteen days to and from London and Ghent, and not a foreign vessel, contemplated under the Act of 3 & 4 Vict. c. 65. s. 6. *That* the "Flecha" has been twice arrested, and twice bailed on the same claim (a), and the owner has been thereby put to vexatious expense in this matter. The prayer was, that the Judge would be pleased either to pronounce the tender sufficient, or to refer Mr. Bache to substantiate any claim he may have to a jury to enforce the same, if entitled to any, and to condemn Mr. Bache in the costs of this suit since the tender.

On behalf of Mr. Bache, the principal averments were denied, and it was alleged in the reply, *that* the two screws were supplied by Mr. Bache in the ordinary course of trade, and without any condition or agreement whatever to the effect that if they did not answer no charge should be made; *that* the propeller first supplied did answer the purposes required thereby; *that* the pattern and make thereof was superintended by Mr. Lowe, the patentee (for which pattern

(a) In consequence of a misapprehension respecting the assignation on the part of the plaintiff, the suit was dismissed, and upon the vessel being arrested the second time, the owner appeared under protest. The question as to the ship's liability to a second arrest upon the same claim was argued, and the Court decided

that the dismissal of the suit was analogous to a nonsuit; that the plaintiff had a right to arrest the ship a second time; that he must pay the costs incurred in the first action, but that the defendant must pay the costs of the appearance under protest.

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"FLECHA."
Pleadings.

and superintendence Mr. Bache paid Mr. Lowe the sum of 5*l.*); *that* it was made in the same manner as the former successful propellers (*a*) had been made; *that* the master of the "Flecha" required a propeller made according to his own plans and wishes, which he thought and said would answer better; *that* he gave Mr. Bache an order for another after and in consequence of its being found impracticable to alter such propeller according to the master's wishes, and the price of the second propeller was agreed between the master and Mr. Bache at 30*l.*, &c.

That the said vessel is a foreign and sea-going vessel, and sails under the Belgian flag, and with Belgian papers, &c.

The Queen's Advocate and Dr. *Spinks* appeared for Mr. Bache; and Dr. *Bayford* for the "Flecha." He cited the "*Sophie*" (*b*) and the "*Ocean*." (*c*)

Judgment.

The power of the Court to direct an issue to be tried by a jury should only be exercised on important and difficult questions.

DR. LUSHINGTON. The first point to which I must apply my mind is the question whether I ought, in compliance with the prayer of the act on petition, which has been so strongly pressed by Dr. *Bayford*, to send this case to be tried by a jury.

Undoubtedly, the Court has power, if it think fit, to direct a trial by jury of any issue in any contested suit depending here; but in a case like the present, where there is a difference of only 60*l.* or 70*l.* between the parties, it would, in my opinion, subject the Court to severe censure. It was only intended that the Court should exercise the power in cases where some important issue was involved, and not in cases like the present, where the principal difficulty lies in discrepant evidence as to the terms of a contract. Indeed, I cannot think it was the intention of the parties to make a prayer of that kind, a compliance with which, would necessarily entail expenses far beyond the amount in dispute. They seem to be under some misapprehension on the subject, and for their sake, no less than for the credit of the Court, I must decline to accede to their request.

I now come to the next objection. It is said that the jurisdiction of the Court depends upon the Act of Parliament, and that the facts of the case do not bring it within the meaning of the words of the Act, according to their true construction.

Now the facts are these: this vessel belonging to Belgian owners, and sailing under Belgian colours, has, for the last two years, been constantly running, every fortnight, between Ghent and London, with cargoes and passengers. On various occasions

The Court has jurisdiction to try the case.

(*a*) This patent screw had been supplied to several steamers, among which was her Majesty's yacht "Fairy."

(*b*) 1 W. Rob. 368.

(*c*) See Notes of Cases, 31.

when lying in the Thames, Mr. Bache, an English engineer, has done repairs to her machinery; and on two occasions, according to his statement, has supplied her with a screw propeller. These being the facts, what is the law applicable to them? The words of the statute, fairly construed, must govern this Court. It enacts, section sixth, that "the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatever for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the necessities were furnished in respect of which such claim is made."

Now the first question will be, Is not this a foreign ship? The second, Are the articles alleged to have been furnished necessary or not? I apprehend that this vessel is to all intents and purposes a foreign ship, and the fact of its frequent voyages to England cannot divest it of that character; and, looking at all the circumstances of the case, and the nature of the traffic in which she was engaged, viz., carrying passengers between the two countries, I am of opinion that the articles were necessities within the meaning of the statute. It is clear that to a vessel of this description a screw propeller is a necessary; but it is argued, that although a propeller may be a necessary generally, yet in this particular instance it was not so, because the vessel was perfectly capable of making her voyage in safety with her old screw. I cannot accede to that proposition, for I think there is a necessity to make such vessels perfect and seaworthy in all respects. The opinion of the Court will always be that these vessels, to which the lives of passengers are entrusted, should be constantly kept in that state of repair which most conduces to their safety. The learned counsel has cited two cases in which I formerly expressed my opinion as to the reasons which led to the passing of this section of the statute; but I then gave the leading reasons, not the only reasons; there were various others, and not the least important among them was that the law of this country might in that respect be assimilated to the general law of the maritime states of Europe, which gives a lien to persons which furnish necessities to a vessel in port or on the neighbouring high seas. I have no hesitation whatever in pronouncing the case to be within the jurisdiction of the Court.

What, then, are the merits of the case? It is a suit brought by a Mr. Bache, of Bermondsey, an engineer, who alleges that he has performed certain work and supplied certain materials to this vessel. A tender has been made for a certain portion of the work, but there is a dispute as to the terms upon which Mr.

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Judgment.

In a passenger steamship, whatever is necessary to put the machinery in perfect working order is a "necessary" within the meaning of the stat. 3 & 4 Vict. c. 65. s. 6.

The clause was enacted in order to assimilate the law of England to that of the other maritime states of Europe.

The question at issue is the nature of the contract under which the screws were supplied.

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Bache supplied the ship with two screw propellers made from the patent of a Mr. Lowe. There is no doubt that the screws were furnished to the vessel, and I have to decide upon what conditions or under what contract they were so furnished.

In the first place, what would be the ordinary contract in such a case, provided no special contract was entered into between the parties? Clearly the purchaser would be bound by his order, unless some fraud had been practised to induce that order, or unless the vendor had not fulfilled his part of the contract by its proper execution.

The defence
that the con-
tract was not
made with the
plaintiff fails.

Now, what is the defence in this case? It is alleged, first, that nothing is due; that all the work which has been performed by Mr. Bache is covered by the tender; that no contract whatever was made with Mr. Bache respecting the screws, but that the contract, whatever it was, was made with Mr. Lowe, who employed Mr. Bache as his workman. If this be so, then, of course, Mr. Bache cannot recover. How stands the matter in the evidence? Of course, I expect to find contradictory evidence. The master swears that "he gave the order to Mr. Lowe, and that during the negotiations for, and trials of, the said screw propellers, he believed and considered that he was treating with Mr. Lowe, the patentee." He is contradicted by Mr. Bache. But the best evidence in my opinion is that of Mr. Lowe himself, who disclaims the contract altogether, and states, in positive terms, "that he never instructed Mr. Bache to make the propellers; that the master alone gave the orders to Mr. Bache for the making thereof; that he himself was merely consulted by the said master for the purpose of giving his consent to his patent being applied to Mr. Bache's workmanship; that such consent was given on condition of his being paid the sum of 5*l*., which was duly paid to him by Mr. Bache." I am of opinion that Mr. Lowe clearly shows that the contract was made with Mr. Bache, and consequently that Mr. Bache is entitled to recover.

So does the
defence that
there was a
special con-
tract by which
the present
claim is
barred.

The second point of the defence is this: it is said that there was a special contract, the terms of which were such that the present claim cannot be sustained. I would here observe that it appears to me extremely inconvenient that such contracts should depend upon parol evidence; the Court would naturally expect the conditions of such a contract to be reduced into writing. It may not, perhaps, be required by the Statute of Frauds, but great difficulties will constantly arise from its neglect. According to the averment of the owners, the terms of the contract were these: that "unless the screw supplied proved satisfactory to the master in producing an increased

speed and a decreased consumption of fuel, it was to be returned, and no charge whatever was to be made." Then they say that the contract was not fulfilled, for that the vessel actually lost speed and consumed more fuel, and that, therefore, the plaintiff cannot recover. Is this satisfactorily proved by the evidence? I must again refer to the evidence of Mr. Lowe, who is the only witness not under a bias: he expressly denies that any specific contract whatever was made; he distinctly says that such averment is untrue.

If such a contract had existed, the Court would expect to find it reduced to writing, especially when it appears that on a previous occasion the master had made a similar contract with an engineer named Rankin, and that such contract was in writing, and signed by both parties. This document is annexed to the affidavit of the master, and is in these words:—

"London, 22nd September, 1853.

"It is agreed between the captain of the 'Flecha' and Benjamin Rankin, that the said Benjamin Rankin shall have the use of the said steam-ship to make trial of a new propeller, patented by him, the said Benjamin Rankin, called the 'semi-disc propeller,' upon the following understanding, that in consideration of the said ship, he, the said Benjamin Rankin, at his own cost, make and fix the said propeller; and, in the event of the trial being successful, the said propeller shall become the property of the owners of the said steam-ship, and on the contrary, the screw to be refixed without charge to the said owners.

(Signed)

"B. RANKIN.

"H. SEENWEN."

Now, it is contended that the new contract was to stand on the same footing as that with Mr. Rankin; but the argument was well pressed by counsel, and I certainly think it is very strong, that the fact of the special contract having been reduced into writing, and signed by the respective parties in the one case, leads to the conclusion that the contract in the subsequent case, not having been so reduced into writing, was not special, but only the ordinary contract between vendor and purchaser. This conclusion is supported by the fact that Mr. Lowe's patent had already been successfully applied to various other vessels, and therefore did not require the loan of the "Flecha" in order to test it. I do not think the master can contend that he entered into any such arrangement with Mr. Bache as he had done with Mr. Rankin.

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"FLECHA."
Judgment.

Such a special contract as that averred should always be reduced into writing.

No special contract proved.

I am of opinion that there is a failure on the part of the The decision

1854.

THE
"FLECHA."*Judgment.*

must be governed by the principles of ordinary contracts between vendors and purchasers.

Under the special circumstances of the case the tender must be overruled, and the claim pronounced for, but with the deduction of 25*l.* for the screw received back by the plaintiff.

defendant to prove any special contract which should exempt this case from the general principles of ordinary contracts between vendors and purchasers. It is not sufficient that the propeller did not answer his expectations or his purposes. It is a general rule of law that if you take an article with your eyes open, and it should afterwards prove inefficient for your object, you must bear the loss, unless you have made some express stipulation to the contrary.

That brings me to the last point, which, indeed, is the only one of any great difficulty. It is this: the first screw was, it seems, taken away by Mr. Bache, and has been retained by him: nothing more is said of it, and I have no explanation whatever of this part of the transaction. The averment is, "that they took away the first screw, which they retained and still retain;" this is not denied. There must, I think, have been some understanding with respect to this screw, though I am not informed of it. It is merely stated by Mr. Bache that he agreed to make the second screw for 30*l.*, whereas the price of the first had been 40*l.*

Looking at all the circumstances of the case, I think I shall do justice to both parties if I exercise the equitable powers with which I am invested, overrule the tender, and pronounce for the claim, with costs, but deduct the sum of 25*l.* for the screw which Mr. Bache received back, and still retains in his possession.

Proctors: for Mr. Bache, *Wills*; for the owner, *Gostling*.

ADMIRALTY
PRIZE COURT.

Aug. 15.

A vessel under Russian colours, with a Russian pass, and whose papers disclosed only Russian owners, being captured, a claim was made by the master as being a neutral, and the lawful owner of one fourth part thereof. *Held*, that the claim could not be sustained, as the enemy's flag and pass imprinted a hostile character on the whole.

"INDUSTRIE."

THIS vessel, a Russian ship, left Hull with a cargo of salt, bound to Riga, on the 18th of December 1853, and after meeting various mischances, was captured off Memel on the 26th of April.

Three fourths of the ship, having been admitted to belong to Russian merchants, was condemned, but a claim was made for one fourth by Jeus Neilson Fuhl, the master, who was, as alleged, a subject of Denmark.

The Queen's Advocate and Dr. R. Phillimore, for the captor, cited the "*Vrow Elizabeth*" (a) and the "*Primus*." (b)

Dr. Addams and Dr. Twiss, for the claimant, cited "*The For-*

(a) 5 C. Rob. 4.

(b) 1 Ecc. & Adm. Rep. 353.

tuna" (a), "*Donna Marianna*" (b), "*Success*" (c), "*Anna Catharina*" (d), "*Onderneeming*" (e), "*Diana*" (f), "*Calma*" (g), and the "*San Francisco Antonius*." (h)

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THE
"INDUSTRIAL."

DR. LUSHINGTON. In all cases of doubt and difficulty, or where there is any novelty, the Court is desirous of taking time, in order that its determination may be expressed in clear and intelligible words; but where the Court entertains no doubt whatever as to the judgment to which it will arrive, and where it sees no difficulty whatever in expressing its reasons with sufficient perspicuity to satisfy its own view of the justice of the case, it is very desirable that no delay should be interposed, lest it should be imagined that it does entertain any doubt at all. Upon the present occasion I am fully prepared, according to the judgment I have formed, to pronounce my opinion. I think, in so doing, I may entirely lay out of consideration what I said in the case of the "*Primus*," because, if it should so happen that I expressed myself hastily, or saw reason to depart from anything I said, I should have the candour and the courage to be ready and willing to reconsider the matter, and to correct it if I were in error.

Judgment.
In clear cases the Court gives its decision immediately, lest doubt should be inferred from delay.

The present decision is given without reference to what may have fallen from the Court in the case of the "*Primus*."

The facts of this case appear to me to be these. This was a vessel sailing under Russian colours, and, as I understand, with Russian papers, not divulging any other interest than that the ship was wholly owned by Russians. She is now claimed by the master, who contends that he is a subject of Denmark, and is entitled to a restoration of one fourth of the vessel, because he was a neutral at the time; and he is not prevented from asserting that claim by reason of the vessel being under Russian colours, or by reason of the papers not disclosing any such interest.

The facts of the case.

I will entirely divert my mind from anything relating to the national character of this individual, for the purpose of argument; but I must candidly state that there are facts appearing on the face of the evidence which would, undoubtedly, create some doubt in my mind as to whether this man is entitled to the national character of a Dane or not. I will state what could not come under the cognizance of counsel. When the interrogatory is first put to him, he states that his home is partly at Riga and partly elsewhere, and then the former is struck out.

Though the national character of the claimant is doubtful, the Court assumes it to be neutral.

(a) 1 Dods. 86.

(b) Ibid. 92.

(c) Ibid. 131.

(d) 4 C. Rob. 107.

(e) 5 C. Rob. 7. note.

(f) Ibid. 60.

(g) Life of Sir Leoline Jenkyns, vol. ii. p. 783.

(h) Not reported, but cited from a MS. volume of the late Sir James Marriott, now in the possession of Dr. Twiss.

1854.

THE
"INDUSTRIE"
Judgment.

The question is, can a neutral maintain a title to restitution at the commencement of a war by reason of being *bond fide* entitled to one fourth part of the vessel antecedent to the war, and up to the time of seizure?

In deciding the question the Court is bound by high authority.

In the "*Vrow Elizabeth*," Lord *Stowell* clearly lays it down that a vessel takes its national character from its flag and pass.

The restitution in the "*Onderneeming*" seems to have taken place under totally different circumstances.

The doctrine asserted in the "*Vrow Elizabeth*" was subsequently agitated before the Court of Appeal, and affirmed.

The question then comes simply to this, can he maintain a title to restitution at this period—the commencement of a war—by reason of being *bond fide* entitled to one fourth part of the vessel at a period antecedent to the war, and up to the time of seizure? I will give him the benefit of all these facts. If this be a question already concluded by high authority, and acquiesced in in various judgments by Lord *Stowell*, and never carried up to the Appeal Court, which then had jurisdiction in prize matters, it is vain for the Court to inquire whether it is bound by such authority. In the case of the "*Vrow Elizabeth*" (a), Lord *Stowell* has expressed himself in the most decided terms with regard to the law. He said, "It would, I think, be extremely hazardous to admit a claim in opposition to this evidence." That relates merely to the question of evidence; but as to the rule of law, he says, "I will go farther, and say that I hold the claim to be also against the established rules of law; by which it has been decided that a vessel sailing under the colours and pass of a nation is to be considered as clothed with the national character of that country." There cannot be a stronger expression than this, and the proposition cannot be more clearly enunciated. It may be said that Lord *Stowell* would condemn the property on other grounds, but of that I know nothing. He stated the reasons which led to his judgment, and the principles of law on which he proceeded.

In a note to this case, it is said, in the "*Onderneeming*" (b), a British subject obtained restitution of seven eighths of the ship, under a Dutch flag and pass. Now, assuming there was no Order in Council, and assuming there were no special directions from the Crown, he would have obtained restitution against the whole law laid down by Lord *Stowell*, and it would have been remarkable if that had been adverted to in a note instead of coming forward as a prominent case, showing the doctrine of the Court. But I cannot doubt what the fact was, for the note goes on, "The King's instructions, July 23. 1803, direct restitutions of ships and cargoes *bond fide* belonging to British subjects, sailing before the knowledge of hostilities from the colonies of France and Holland, to whatever country they might be going." This opinion which I have formed appears to be borne out by a note at the end of the volume (c): "Since the decision of the Court of Admiralty in the case of the '*Vrow Elizabeth*,' where the flag and pass of the enemy was held conclusive for the claim of the ship on behalf of a neutral proprietor, though adopted prior to hostilities, and without any prospect of such an event, the same question has been fully agitated

(a) 5 C. Rob. 4.

(b) 5 C. Rob. 7.

(c) 5 C. Rob. Appendix.

before the Court of Appeal in several cases, and with a similar result." No distinction was made between the flag being adopted prior to the commencement of hostilities, and when there was no reason to suppose that hostilities would have taken place, and the flag being adopted *flagrante bello*. By these authorities I must hold myself concluded.

If there be an exception on the present occasion it must be shown to be in circumstances which have not been brought to my attention, but which will take it out of the principle. When the vessel is sailing under a neutral flag, the captors may show that all the property is not neutral, but part of it belongs to an enemy, and in that case you divide it, and condemn the part which is hostile, and not the part which is neutral; but the proposition is not true *vice versâ*, that where a vessel is sailing under a hostile flag, you can claim, on behalf of a neutral, the property under an enemy's flag.

From the cases cited from Sir *Leoline Jenkyns* and Sir *James Marriott*, I cannot draw deductions contrary to the principles to which I have adverted. What would become of belligerent rights, if, when you search vessels under hostile colours, you are to be told, "This is not a Russian vessel; it is neutral, or nine tenths is neutral. You are quite mistaken; it is entitled to restitution at the hands of the Court." It is manifest that the right of search, under these circumstances, would be destroyed. It is clear that the whole trade of an enemy might be carried on with perfect impunity, and all the naval force of France and Great Britain would never be able to carry into execution those rights which they are undoubtedly justified in exercising by the law of nations. I entertain no doubt in this case, and I condemn the vessel.

Proctors: for the captors, *The Queen's Proctor*; for the claimant, *F. Clarkson*.

1854.

THE

"INDUSTRIE."

Judgment.

The period of the adoption of the flag and pass, whether before or after the outbreak of hostilities, makes no difference.

No circumstance in the present case exempts it from the general principle.

In the case of a ship under a neutral flag, captors may prove that all the property is not neutral, but that part belongs to the enemy; but the converse of the proposition is not true.

No case cited justifies a deduction contrary to the general principle.

If the principle were not maintained, the right of search would be destroyed.

The vessel must be condemned.

"THE POLKA."

THE commanders of her Majesty's ships "Amphion" and "Conflict" having received information that a number of Russian merchant-vessels were lying in the port of Libau, anchored within gunshot of the town on the 17th of May last, summoned the governor to surrender the said vessels within three hours. At half-past three p.m. of the same day an answer was received from the authorities, to the effect that they were without the means of defence, and would readily send the vessels out but could not possibly do it within the time specified.

ADMIRALTY PRIZE COURT

Aug. 15.

Under peculiar circumstances the Court will condemn a prize which has been taken into and lies in a neutral port and allow it to be sold there.

1854.
 THE
 "POLKA."

Whereupon the captains of the "Amphion" and "Conflict" caused the ships' boats to be manned and armed, and they proceeded with them to the port. Having had the Russian vessels—seven schooners and one brigantine—pointed out, they took possession of them, brought them out into the roads, and finding them not to be in a condition to perform a voyage to England, afterwards took them to the port of Memel, where they remained to await the decision of the Court.

At the time of their capture the vessels were found all dismantled, their sails unbent, and some of them aground. Two of them were scuttled, the whole of them deserted by their crews, and no papers whatever were found on board, neither could the captors obtain any information whatever respecting them, but believed they had been taken away by the masters when they deserted the vessels.

The above circumstances were fully verified by affidavits, and

The Queen's Advocate moved the Court to condemn the vessels and decree their sale in the port of Memel, stating that an intimation had been received from the Prussian Government, that no objection would be made to such a course, provided they were sold by private contract, without being advertised or put up to auction.

Judgment.

DR. LUSHINGTON. The circumstances under which the present application is made, are quite peculiar, and form an exception to the general principle upon which this Court proceeds. Though there is no direct evidence that the vessels are Russian, yet there is no claim, and the Court entertains no doubt upon the subject. I have no hesitation in condemning them; and, looking at the fact deposed to, that they are not in a fit state to be brought to England, and the consent of the Prussian Government to their sale at Memel, the Court will allow that course in the present case, but with the proviso that the wishes of the Prussian Government shall be fully observed with respect to the sale.

I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captors' country, and the Court must guard itself against allowing a precedent to the contrary to be established.

Broctor: *The Queen's Proctor.*

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It may be quite true that during the lifetime of the husband the wife's paraphernalia are entirely subject to the control of the husband, but at his death they survive to the use of the wife, and remain in her possession. *Id.*

Though paraphernalia may be subject to the husband's debts, yet the wife has a right to retain them until a deficiency of assets compels the executors to claim them. *Id.*

On the death of a partner, his share of the partnership property in possession, however large, does not constitute *bona notabilia* if the estate be insolvent, and there be no balance after the liquidation of all partnership claims. *Id.*

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See *Bottomry Bond*.

E. L. died intestate, leaving C. L., her husband, surviving. He became bankrupt (A. B., and C. being appointed his assignees), and then died without having administered to his wife. Some property subsequently accrued to his wife. J. L. then administered to his brother, C. L., and also to E. L., and having converted the property to his own use instead of paying it over to his brother's assignees, himself became insolvent. On application of the assignees, the sureties to the bond were cited to show cause *contra*, and the Court allowed the bond to be delivered out. *Drews v. Long* (Prerog.), 391.

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1. A bottomry bond having been given, it is allowable to pay that and to include the amount in a fresh bond during the same voyage, but not in a subsequent one. *The "Tobio"* (Court of Adm.), 185.

2. A bottomry bondholder entered an action against the ship, cargo, and freight. The owners of the cargo appeared, and gave bail in the sum of 350*l*. The proceedings were in *panam*. The bond was pronounced for, the ship sold, the proceeds of sale and the freight were brought into the registry. The claims for wages, which proved unexpectedly heavy, having been settled, the deficiency on the ship's account for the bond and proctor's costs amounted to 409*l*. 9*s*. 2*d*., which the owners of the cargo were called upon to pay. They tendered 350*l*., the amount of their bail. Motion for a monition against the owners of the cargo to pay the balance rejected. *Held*, that though the master may become *ex necessitate* agent of the owners of the cargo, he can render them liable only to the value of the cargo; that any liability beyond that can arise only from the conduct of such owners in contesting the validity of the bond; that they cannot be liable to costs not occasioned by their conduct; that the amount of their bail is the limit of their liability, as regards the bond; that the bail might have been taken to the full value of the cargo; and that its not having been so taken was the act of the bondholder himself, who must abide by the consequence. *Nostra Senora Del Carmine* (Court of Adm.), 303.

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1. A vessel is not barred of her remedy in a case of collision, by the mere fact of her having ne-

gleoted to show a light according to the orders of the Commissioners, unless it appear that neglect in some degree contributed to the accident. *The "Panther"* (Court of Adm.), 31.

In a river or narrow channel, a steamer must keep, as far as is practicable, to that side of the mid-channel which lies on the starboard side. *Ib.*

2. Assessors appointed to assist the registrar and merchants in the reconsideration of their report, the Judge himself being also present in the registry. *The "Sir George Seymour"* (Court of Adm.), 67.

3. A collier brig out at sea in foggy weather, desiring a steamer at a distance, as she stated, of three or four cables' length, held to blame for not having given notice by blowing a fog-horn. *The "Carron"* (Court of Adm.), 91.

The *onus probandi* may shift from one party to the other in the cause. *Ib.*

4. Neither of two sailing vessels, which came into collision, having observed the Admiralty regulations respecting lights, and neither having pleaded that the collision was occasioned by such non-observance on the part of the other, the Court, nevertheless, *Held*, that under the circumstances of the case, both vessels were barred of recovery by 14 & 15 Vict. c. 79. s. 28. *The "Alival"* (Court of Adm.), 96.

The Court is bound to take notice of the statute 14 & 15 Vict. c. 79., and of the Admiralty Rules made by virtue thereof, though not put in plea, nor touched upon in argument. *Ib.*

5. A claim by the owners of a damaged vessel for loss sustained, estimated moderately to avoid litigation, having been rejected, and the matter afterwards referred to the Registrar and merchants, the owners are not bound by their original estimate, nor barred of their right to prove an actual loss greater than that estimate. *The "Two Sisters"* (Court of Adm.), 99.

6. A vessel dragging her anchor, and coming into collision with another, *Held* to blame for not letting go another anchor. *Held*, also, that this was the fault of the pilot alone, and that the owners were therefore not liable. No costs. *The "Northampton"* (Court of Adm.), 152.

If a ship lying at anchor from the strength of the tide, drifted with her anchor, that would be driving. If the wind drove her across the tide, and she fairly dragged her anchors, that would be dragging. *Ib.*

There should be that space left for the swinging to the anchor, that in ordinary circumstances, the two vessels cannot come together. If that space be not left, it is a foul berth. *Ib.*

7. A vessel, with the wind free, meeting another close hauled on the larboard tack, having ported her helm and come into collision: *Held*, to blame; the Elder Brethren being of opinion that the captain gave the order heedlessly, and without looking at the position of the other vessel. *The "Sea Park"* (Court of Adm.), 186.

8. In causes of collision, a verdict obtained at Common Law cannot be pleaded. *The "Clarence"* (Court of Adm.), 206.

A steam-ship held solely to blame for not having given way to a sailing-vessel close hauled on the larboard tack, although porting the helm would not have thrown the sailing vessel out of command. *Ib.*

The evidence on which a verdict at law has

been founded may have been quite different from that produced in the Admiralty Court: it would then be detrimental to justice to attribute any weight to it. *Ib.*

The practice in the Prerogative and Consistory Courts forms no guide for the practice in the Court of Admiralty. *Ib.*

In divorce suits the verdict at law, at least, shows that the husband is not afraid to subject his own conduct to a strict examination, and his witnesses to a *viâ voce* cross-examination. *Ib.*

In the statute 14 & 15 Vict. c. 79. s. 27., what is meant by the proviso, "and as regards sailing vessels, to the keeping of each vessel under command," is, that if a vessel be close hauled, and at the same time there is a vessel going free, the vessel close hauled is not to throw herself into stays, because she would be no longer under command. *Ib.*

9. A steam-ship proceeding down the Thames at night, meeting a sailing barge, close hauled on the starboard tack, nearly in mid-channel, in Bugsby's Reach, stopped her engines and ported her helm; but *Held* to blame for not having reversed. *Held*, also, that the barge was not bound to go about. *The "Trident"* (Court of Adm.), 217.

10. Two vessels, the one A. close hauled on the port tack, the other B. on the starboard tack, sailing free, meet each other under circumstances of probable collision; A. luffed twice. *Held*, that she was to blame for not having ported, that the collision was principally occasioned by her non-obedience to the rule, and that by the statute she would not recover. B. also luffed up three times: *Held*, to blame for not having ported in time. Neither vessel can recover. *The "Wansfell"* (Court of Adm.), 269.

11. A vessel is not relieved of her obligation to make way for another close hauled on the starboard tack by reason of her crew being engaged in reefing her topsails. *The "Blenheim"* (Court of Adm.), 285.

A vessel to which the blame of a collision is attributed is liable not only for the immediate damage, but for the consequential loss arising from the abandonment of the injured vessel by her crew, under reasonable apprehensions of danger. *Ib.*

The abandonment of the injured vessel by her crew is a question of law, and not a question for the consideration of the Trinity Masters. *Ib.*

12. A brig proceeding in a cause of damage barred of recovery by reason of her non-observance of the Admiralty regulation respecting lights having occasioned the collision. *The "Fairy"* (Court of Adm.), 298.

13. A vessel lying at anchor in a roadstead exhibited a light in her mizen rigging instead of at her mast head.—*Held*, in the Admiralty Court, that under the circumstances the light would be *as visible in that place*, and that therefore the collision could not have been occasioned by the deviation from the literal requirements of the Admiralty order; but reversed on appeal to the Privy Council, which *Held* that the light was not *as visible*—that the deviation from the Admiralty order occasioned the collision, and that therefore the vessel proceeding was barred of recovery, and must be condemned in the costs of both Courts. *The "Telegraph." Valentine v. Cleugh*, (P. C.), 427.

A vessel at anchor must prove in cases of collision, that she was properly anchored, and had complied substantially with the regulations respecting lights. The *onus probandi* then shifts. *Id.*

It seems optional whether the light should be on the foremast, mainmast, or mizenmast, but "at the mast head" means at the top of top-gallant mast, if that be standing, and not merely against the mast. *Id.*

If the light were placed in a part of the vessel where it could not be seen so well as if it had been placed at the mast head, the legal inference would be that the deviation from the Admiralty rule occasioned the collision, though deviation from the rule is of itself no bar to recovery, unless the collision were occasioned by such deviation. *Id.*

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Husband's defence against the charge of association and adultery with various prostitutes, that he was agent for a society for their reformation, and associated with them solely from pure and laudable motives, *not sustained* by the evidence. Sentence of divorce by reason of adultery only. *Id.*

2. In a suit for divorce, on the ground of adultery, it is allowable to plead undue familiarity and illicit intercourse antecedent to marriage, when the adultery is charged to have been committed *with the same person as the ante-nuptial incontinence*. *Weatherley v. Weatherley* (Consis.), 193.

General rule that marriage operates as an oblivion of the past, and that ante-nuptial incontinence cannot be pleaded. *Id.*

There may be exceptions to the rule, particularly when the person with whom ante-nuptial connection is charged is continued in the service of the husband after marriage; and is, moreover, the person with whom he is charged with committing adultery. *Id.*

The antecedent circumstances elucidate subsequent acts, and thereby acts taken *per se* of a doubtful character assume a very different complexion. *Id.*

3. Various acts, not singly or by themselves amounting to acts of cruelty, to justify a sentence of divorce, taken together, and considered with reference to the proved habits of intoxication of the husband, *held* sufficient to justify such sentence. *Cheesutt v. Cheesutt*, (Consis.), 196.

The wilful communication of a cutaneous disorder, *held* to be an act of legal cruelty, though not by itself sufficient to found a sentence of separation. *Id.*

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Of Capacity of Testator. See *Will*, 2.

The declarations of the master *are*, of the
mate and seamen *are not*, admissible evidence
against the owners of a vessel. *The "Acton"*
(Court of Adm.), 176.

It is open to either party to proceed by plea
and proof, though the proceeding by act on petition
is generally more convenient. *Ib.*

The Court does not encourage objections to
the pleadings in these cases, though they may
sometimes be expedient. *Ib.*

The admissibility and the weight of evidence
are two distinct questions. *Ib.*

If evidence be admissible, the Court cannot
reject it, because it appear unimportant. *Ib.*
177.

Declarations of the master of a vessel are ad-
missible evidence against the owners, because he
is their agent; but that principle cannot be ex-
tended to the mate or other persons on board.
Ib.

The declaration of the master cannot be re-
jected on the ground that his knowledge of the
fact of which he spoke was derived from hearsay,
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when he was in charge of it. *Ib.*

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stantly between Ghent and London, employed
an engineer in London to do some repairs, and
to supply him with a new screw propeller. —
Held, 1st, that the Court had jurisdiction under
the statute 3 & 4 Vict. c. 65. s. 6., as whatever
was necessary to put the machinery of a pas-
senger steam-ship in the best working order was
a "necessary" within the meaning of the Act.
2ndly, that where no special contract was proved,
the purchaser takes at his own risk. *The*
"Flecha" (Court of Adm.), 438.

LAPSE OF TIME.

See *Nullity of Marriage*, 2.

LAW MARITIME.

See *Shipping*, 2.

LETTERS OF ADMINISTRATION.

1. The widow of the deceased, being confined
under the Queen's warrant as a criminal lunatic,
a a 3

letters of administration were granted absolutely to a cousin german as next of kin, no medical certificate of insanity being required. *In the Goods of John Henry Ogden, deceased* (Prerog.), 113.

2. J. B. died, leaving a widow, from whom he had separated on suspicion of her adultery, and two infant children, whom, during his life, he had left under her charge. The grandfather, on behalf of the infants, opposed the widow, and prayed the Court to grant the administration to him until one of the children should come of age. Under the circumstances the Court decreed it to the widow, but gave the grandfather's costs out of the estate. *Brown v. Brown* (Prerog.), 423.

LEX LOCI CONTRACTUS.

See *Shipping*, 2.

LIEN.

Of Master. See *Shipping*, 3. See *Prize of War*, 3.

LUNATIC.

See *Letters of Administration*, 1.

MALFORMATION.

See *Nullity of Marriage*, 2.

MARINER.

See *Probate*, 5.

MARINES.

See *Salvage*, 13.

MARITIME LAW.

See *Shipping*, 2.

MARRIAGE.

See *Nullity of Marriage*.

MASTER.

Agreement by, to divide Wages of Deserters amongst remaining Men. See *Shipping*, 3.

Authority of, to sell Ship. See *Id.* 2.

Declarations of. See *Evidence*.

Lien of. See *Shipping*, 3.

Where, alien, Claim of Lien not allowed as against Captors. See *Prize of War*, 3. 5.

MATE.

Declaration of. See *Evidence*.

NATIONAL CHARACTER.

Effect of Domicile on, acquired by Birth. See

Prize of War, 4.

Effect of Residence on, in Time of War. *Id.* 8.

NECESSARIES.

What are, within the meaning of stat. 3 & 4 Vict. c. 65. s. 6. See *Jurisdiction*.

NEUTRALS.

See *Prize of War*, 2. 3. 5.

Condemnation and Sale of Prize taken, and lying in Neutral Port. See *Id.* 12.

Share of. See *Prize of War*, 9.

Vessel under Colour, and with Pass of Enemy. See *Id.* 11.

NULLITY OF MARRIAGE.

1. Marriage declared null and void by reason of the husband's impotence, notwithstanding there had not been triennial cohabitation, and there was no visible defect. Costs against the husband. *A. falsely called B. v. B.* (Consia.), 12.

Medical certificate of husband's impotency, quod hanc, sufficient. *Id.*

After a triennial cohabitation without consummation, the law presumes impotence. *Id.*

The rule of law is no more than a presumption of universal from proof of a particular impotence. *Id.*

The rule founded upon probability alone, requires lapse of time, combined with facility for consummation. *Id.*

The Court is not bound to adopt the letter rather than the spirit of the rule. *Id.*

Circumstances may justify departure from the strictness of the rule. *Id.*

No fixed period of cohabitation in Scotland. *Id.*

2. A husband having been about eighteen years married, and having constantly cohabited with his wife for several years, instituted a suit for nullity by reason of the incurable malformation of the wife.—*Held*, 1st., that time alone will not, but, coupled with other facts proving insincerity, will operate as a bar to such a suit. 2nd., that lapse of time must be accounted for. 3rd., that the evidence in the present case did not sufficiently account for lapse of time, but showed partial connection to have taken place between the parties, and that the suit was instituted *alio intuitu*. 4th., that, under the whole circumstances of the case, the husband was not entitled to a decree of nullity. *B—s v. B—s* (P. C.), 248.

3. The illegitimate daughter of a woman who had lost her original name and acquired another was married by banns published in her original name, not as being the daughter of such mother, but of the mother's brother, who, at the marriage, also represented himself as her father.—*Held*, under the circumstances, which were surrounded with fraud, that the marriage was had without due publication of banns, and, both parties being cognizant thereof, was null and void. *Tooth v. Barrow*, otherwise *Tooth* (Arch.), 371.

4. Sentence of nullity of marriage by reason of impotence after a cohabitation of three months only. *G.—s. v. T.—s.* (Consia.), 389.

ONUS PROBANDI.

See *Collision*, 3. 13. See *Prize of War*, 5. See *Revocation*, 5. See *Salvage*, 5.

ORDERS IN COUNCIL.

See *Prize of War*, 1. 10. See *Appendix*, i.—xiii.

OWNERS.

Liability of, limited to Amount of Bond. See *Bottomry Bond*, 2.

Not bound by Original Estimates. See *Collision*, 5.

Not liable for Faults of Pilot. See *Collision*, 6.

PARAPHERNALIA.

See *Bona Notabilia*.

PARTNERSHIP PROPERTY.

See *Bona Notabilia*.

PILOT.

Owners not liable for Faults of. See *Collision*, 6.

PILOTAGE.

As distinct from Salvage. See *Salvage*, 1.

Where Services become Pilotage, and where Salvage. *Ib.* 16.

PIRACY.

Three hundred and thirty-four subjects of the Chilian Government, who had risen in rebellion against it, and had also seized the vessels of other countries, held to be pirates within the meaning of 13 & 14 Vict. c. 26. *The Magellan Pirates* (Court of Adm.), 181.

All nations agree that robbery and murder on the high seas are piratical acts. *Ib.*

It does not follow that, because persons are insurgents or rebels against the government of their own country, they may not also commit piratical acts against others. *Ib.*

In criminal law, all persons found guilty of piratical acts are held to be pirates. *Ib.*

An independent state may be guilty of piratical acts. *Ib.*

The intention of the Legislature was, that acts of piracy should constitute men pirates. *Ib.*

In construing Acts of Parliament the presumption is, where nothing to the contrary appears in the context, that an expression is used in conformity with a similar expression known in Common Law. *Ib.*

The statute 13 & 14 Vict. c. 26. must be read in connection with 6 Geo. 4. c. 49. The object of both statutes was to put down piratical acts by whomsoever committed. *Ib.*

PLEADING.

General rule that Ante-nuptial Incontinence cannot be pleaded. See *Divorce*, 2.

In Causes of Collision Verdict obtained at Common Law cannot be pleaded. See *Collision*, 8.

Objections to, not encouraged. See *Evidence*.

Proceedings by Plea and Proof open to either Party. *Ib.*

1. A plea "that half an hour previous to the collision in question, the 'C.' had run foul of a barge opposite B. C., and that on being threatened with legal proceedings, her owners had paid the damage," struck out on objection taken thereto. *The "Cosmopolitan"* (Court of Adm.), 179.

2. Revocation of will by subsequent marriage.—*Held*, a party may plead the marriage generally, in order to obtain the answers of the other party as to the fact. *Browne and Thomas v. Thomas* (Prerog.), 29.

POLICY OF INSURANCE.

Not Void by Deviation to assist Vessel in Distress. See *Salvage*, 5.

POLL.

Agreement to close before usual Hour. See *Churchwarden*.

PRACTICE.

See *Alimony*, 1.

Assessors appointed to assist in Reconsideration of Report. See *Collision*, 2.

In Prerogative and Consistory Courts forms no Guide for the Practice in the Court of Admiralty. *Ib.* 8.

1. Unpublished depositions cannot be given out of the custody of the Court, nor copies thereof be taken. *In the Goods of the Reverend John Hewlett, deceased* (Prerog.), 3.

2. An original will, deposited in the registry of the Prerogative Court of Canterbury, can only be delivered out for the purpose of being given into the custody of the legal authorities of some other country, and that upon good cause shown. *In the Matter of the Will of the late Napoleon Bonaparte* (Prerog.), 9.

3. Testator died in the East Indies, leaving property in England. His son and executor, J. L., being in Calcutta, his attorney, J. J., took out the usual letters of administration, and afterwards brought into the registry an inventory, and an account which showed a large balance. J. L. having afterwards himself applied for and obtained probate, and J. J.'s authority being thereby terminated, a proctor appeared for J. L., and exhibited a special proxy; and the Court, on his petition, granted a monition to J. J. to pay the balance of the said account which had been allowed to him, the said proctor, for the use of his party. *In the Goods of John Lucas, deceased* (Prerog.), 107.

PRESUMPTION.

See *Alterations and Interlineations*, 1.

Of Law. See *Nullity of Marriage*, 1.

PRIVILEGE.

See *Probate*, 5, 6.

PRIZE OF WAR.

See *Orders in Council*, Appendix i.—xiii. See *Standing Interrogatories*. *Ib.* xiii.

1. A vessel belonging to Bjorneborg, in Finland, sailed from Hartlepool to Copenhagen with a cargo of coals, which she there discharged, for the use of the British fleet, prior to the declaration of war, which took place on the 29th of March. She was unable to sail to Bjorneborg immediately after her cargo was discharged, by reason of the ice; but on the 10th of April she left Copenhagen, bound for that port, in ballast, and was captured on the 12th.

Held, she was not protected by the Orders in Council. *The "Fenix," otherwise "Phanis"* (Prize C.), 306.

The different documents emanating from the Government must be construed together, so as to elucidate one another. *Ib.*

It is not usual to state reasons in such documents. *Ib.*

Documents such as Orders in Council, relaxing the severity of belligerent rights, are to be construed most liberally for those in whose favour they were made. *Ib.*

But interpretation must be confined to the words of the document, and not travel beyond it. *Ib.*

The Queen of England has supreme power,

with the advice of her Council, to relax her belligerent rights, and so far to make law for the Prize Courts. *Id.*

2. A claim for one third of the proceeds of the ship founded on a mortgage deed, on behalf of a citizen of Lubeck resident at Helsingfors, in Finland, as Consul of the King of the Netherlands, disallowed. *The "Aina"* (Prize C.), 313.

A neutral, resident as merchant and consul in the enemy's country, loses his neutral character during such residence. *Id.*

Foreigners, cannot set up a mortgage deed on the ship against captors, though, under certain circumstances, the lien of British merchants may be allowed. *Id.*

3. The Court cannot restore property to an enemy master without the consent of the captors. *The "Aina"* (Prize C.), 316.

A neutral continuing to reside in the enemy's country during war loses neutral privileges. *Id.*

There is no case where the claim of lien on behalf of aliens has been allowed against captors. *Id.*

4. A vessel built in Hanover in 1853, sailed in ballast to Riga, with a crew of Hanoverians. She then sailed, under Russian colours, to Havre, thence to Newcastle, thence to Lisbon. There she took in a cargo, and sailed for London on the 4th of April, under Hanoverian colours. Shortly after her arrival in the London Docks she was seized by a Custom House officer. She was claimed on the ground, that while lying at Newcastle she had been, under a power of attorney, given by the owner to the master, sold, and transferred to a Hanoverian. *Further proof allowed.* *The "Johanna Emilia," otherwise "Emilia"* (Prize C.), 317.

The legal consequences of destruction or spoliation of papers depend for the most part upon the circumstances of each case. *Id.*

If a native of one country reside and carry on trade in another for some time, his national character is that of his domicile, not of his birth. *Id.*

It is perfectly legal for any of her Majesty's subjects, whether commissioned or not, to seize an enemy's ship; but it does not become the prize of the seizer. *Id.*

5. The claim of neutral merchants for 2650 bags of coffee consigned to them on the credit of advances made by them, disallowed. *The "Ida"* (Prize C.), 331.

The claim is that of lien, which cannot be upheld against captors. *Id.*

Further proof cannot be allowed when there has been an attempt to deceive the Court by simulated papers. *Id.*

It is a rule of the Court, that where there are contradictory papers, the *onus probandi* lies on the claimant to show that belligerent rights are not thereby affected. *Id.*

6. The claim of an alien enemy directed to be amended, as not stating any matter to give him a *persona standi in judicio*. *The "Troja"* (Prize C.), 342.

7. When the evidence of the master as to the ownership of the property claimed is deficient, it cannot be restored without further proof. *The "Fidentia"* (Prize C.), 344.

In examining upon the standing interrogatories, it is the examiner's duty to take full answers to each question, and not to allow the witness to refer to his previous answers. *Id.*

8. A Russian vessel sailed from Cadix on the 27th February, bound to Abo, with a cargo of salt, olive oil, &c. On the 2nd of March the shipper, a British subject, resident there, made an affidavit before the British consul that the olive oil was his property. The vessel was captured on the 15th of April. A claim was made on behalf of the shipper for this olive oil. Further proof allowed. *The "Abo"* (Prize C.), 347.

In time of war, a person is considered as belonging to that nation where he is resident, and where he carries on his trade. *Id.*

9. A neutral's share in a ship sailing under the flag and pass of an enemy is liable to condemnation. *The "Primus"* (Prize C.), 353.

The cargo shipped under a charter-party restored to the neutral charterers. *Id.*

Whoever embarks his property in shares of a ship is bound by the character of that ship, and, consequently, neutrals are not entitled to restitution of their portion of an enemy's vessel. *Id.*

The Court has full authority to condemn property which is condemnable by the Law of Nations, whether such property belongs to Russian subjects or not. *Id.*

10. The Order in Council of 29th of March 1854, exempts from capture Russian vessels which, prior to the 29th of March, shall have sailed from any foreign port bound for any port in her Majesty's dominions. *The "Argo"* (Prize C.), 375.

A vessel under a charter-party for a voyage from Havannah or Matanzas to Cork, sailed from Havannah in ballast prior to such date, took in her cargo at Matanzas, and sailed thence subsequent thereto. — *Held*, that it was a continuous voyage; that it commenced at Havannah, where the charter-party was entered into, and that the ship must be restored under the Order in Council. *Id.*

11. A vessel under Russian colours, with a Russian pass, and whose papers disclosed only Russian owners, being captured, a claim was made by the master as being a neutral, and the lawful owner of one fourth part thereof. *Held*, that the claim could not be sustained, as the enemy's flag and pass imprinted a hostile character on the whole. *"Industria"* (Prize C.), 444.

The period of the adoption of the flag and pass, whether before or after the outbreak of hostilities, makes no difference. *Id.*

In the case of a ship under a neutral flag, captors may prove that all the property is not neutral, but that part belongs to the enemy; but the converse of the proposition is not true. *Id.*

12. Under peculiar circumstances the Court will condemn a prize which has been taken into and lies in a neutral port, and allow it to be sold there. *The "Folke"* (Prize C.), 447.

PROBATE.

1. Signature of testator in the *testimonium* clause, not evidently intended for his final signature. Probate granted on consent. *In the Goods of Richard Dinmore, deceased* (Prerog.), 2.

2. A testator duly executed his will, appointing his wife, H. S., universal legatee for life. She dies. He then marries her sister, and afterwards dies. The Court refused to grant probate of the said will, as unrevoked by the incestuous marriage, upon an affidavit of the facts, without

the pretended widow having first been duly cited. *In the Goods of Thomas Smith, deceased* (Prerog.), 105.

3. Probate decreed of an unattested paper purporting to be a first codicil, dated 4th of July 1850, and a duly executed codicil, dated 8th of October 1853, together containing a codicil to the will. *In the Goods of Richard Hillhouse, deceased* (Prerog.), 111.

4. E. A. N., a spinster, having invested money in the funds, and described herself as E. A. R., widow, and afterwards invested other money in her right name, the Court refused to decide the question of identity by granting a special probate of her will, which was in her right name, and showed no ambiguity. *In the Goods of Elizabeth Ann Neale, deceased* (Prerog.), 112.

5. A vessel was lying at Melbourne in Australia, when H. C., who had been some time resident there, shipped on board as an able seaman to return to England. The vessel did not sail for some days after. Irregular papers of H. C., dated the very day on which he shipped, not entitled to probate as a mariner's will under section 11. of the statute. *In the Goods of Henry Corby, deceased* (Consis.), 292.

6. A soldier under orders to proceed from his station in one Indian presidency to take part in the war going on in another, and making his will only two days before he commenced the march, is not entitled to the privilege of a military testament. *Bookes v. Jackson* (Prerog.), 294.

7. The deceased left a will dated in 1841. After his death a paper, purporting to be a will of subsequent date, but proved by various circumstances to be a forgery, was clandestinely sent to the executor. The circumstances having been stated, and the Court asked to grant probate of the false document, not only rejected the motion, but under the circumstances decreed probate of the genuine will of 1841. *In the Goods of John Goss, deceased* (Consis.), 413.

PROCTOR.

Concealing Facts. See *Inventory and Account*.
Not justified in requiring excessive Bail. See *Salvage*, 9.

RE-EXECUTION.

Of Will by Acknowledgment. See *Alterations and Interlineations*, 2.

REGISTRAR AND MERCHANTS.

Assessors appointed to assist in Re-consideration of Report of. See *Collision*, 2.

RESIDENCE.

Effect of, on National Character in Time of War. See *Prize of War*, 8.

REVOCATION.

1. Testator, having duly executed his will, became afterwards of unsound mind; and while in that state, destroyed it. Having partially recovered, he expressed regret, and gave directions for the preparation of another will to the same effect. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will. *In the Goods of David Downer, deceased* (Prerog.), 106.

2. In questions of revocation of a testamentary paper by a subsequent instrument, the main

thing to be looked at is the intention of the testator. *Richards v. The Queen's Proctor* (Prerog.), 235.

If a testamentary instrument contain no express revocation of former ones, the Court will not infer such revocation from the mere appointment of an executor in the subsequent one. *Ib.*

3. A. C. made a will in 1825, and in 1852 duly executed another testamentary paper, the contents of which were unknown, beyond the fact of its beginning and ending with the words "last will." At his death the later instrument was not forthcoming, but there was no evidence of its destruction.—*Held*, that the former will, though existing uncancelled, was revoked, and that the deceased died intestate. *Cutto v. Gilbert* (Prerog.), 276.

4. R. P. duly executed a will prior to the 1st of January 1838, and upon the same paper a codicil subsequently thereto. He afterwards married, but survived his wife.—*Held*, that the codicil brought the will within the operation of the statute, and that both were revoked by the marriage. *In the Goods of Richard Pugh, deceased* (Prerog.), 416.

5. A. C. made a will in 1825, which existed uncancelled at his death. In 1852 he duly executed another instrument, the contents of which were unknown beyond the fact of its beginning and ending with the words "last will," but it was not forthcoming at his death, and there was no evidence of its destruction.—*Held*, 1st. That the *onus probandi* lies upon the party setting up the later instrument to prove it revocatory of the former. 2. That, in order to revoke an existing instrument by parol evidence of the subsequent execution of another, such evidence must be strong and conclusive. 3. That the mere execution of an instrument, though called a last will, is not sufficient of itself to revoke a previous instrument, unless the later be proved to be different from and inconsistent with the former. 4. That when the contents of the later instrument are unknown, the former is not thereby revoked. 5. That in this case there is no proof whatever of the contents of the later instrument, and that, therefore, the judgment of the Court below, pronouncing the former revoked, must be reversed. *Cutto v. Gilbert* (P. C.), 417.

SALVAGE.

1. If a vessel, out at sea, beyond the limits of pilotage ground, require assistance to conduct her to a place of safety, that is not pilotage but salvage. *The "Hedwig"* (Court of Adm.), 19.

Fishermen salvors cannot claim compensation for the loss of their fishing, unless they clearly state to a foreign master their intention to do so before their services are accepted. *Ib.*

Tender of 30*l.* overruled; 50*l.* given, but costs refused, because it appeared from salvors' affidavits that they had refused 80*l.* *Ib.*

2. The services of a steam-tug, within its usual locality, not necessarily towage, but may, by circumstances, be raised into salvage. *The "Madora"* (Court of Adm.), 17.

3. *Prima facie*, it is sufficient for salvors to show that they conducted a vessel to a place of safety. *The "Houthandel"* (Court of Adm.), 25.

Salvors bound to show adequate skill in performing the service they have undertaken. *Ib.*

The *onus* lies upon the objectors to prove that

that place was not the one to which she should have been taken. *Id.*

Seable, it is not the duty of salvors to comply with the wish of a master to be conducted to a foreign port to their manifest inconvenience. *Id.*

4. Salvors having made great exertions to save a ship and cargo, were at length, with her crew, compelled to abandon her. She was afterwards found and saved by a steamer.—*Held*, that the original salvors were entitled to salvage reward under the circumstances. *The "E. U."* (Court of Adm.), 63.

The principle of salvage is, to reward exertions which have been successful in saving property. Exertions, therefore, however meritorious, which have not been successful in any degree, cannot receive salvage reward. *Id.*

5. Salvors in possession of a vessel abandoned by all her crew but two, who had been unable to effect their escape, would not be bound to delay their course for the sake of taking on board again the crew of that vessel. *The "Orbona"* (Court of Adm.), 61.

A policy of insurance is not rendered void by deviation to assist a vessel in distress. *Id.*

6. A vessel of the value, with her cargo, of 17,337*l.*, got off the rocks by the assistance of a pilot and about thirty-four hands, for which the owners tendered 250*l.*; but the Court awarded 400*l.*: and *Held*, that the fact of an officer in the navy, who held an official appointment there, having given directions to the salvors, did not detract from the merit of their service. *The "Persia"* (Court of Adm.), 166.

7. A passenger steamer on a voyage from London to Rotterdam, having broken the main shaft of her engines, engaged a tug to tow her over to Holland, being a distance of about ninety miles, which was done successfully. A tender of 175*l.* having been rejected, was held to be sufficient. Salvors condemned in costs. *The "Batavier"* (Court of Adm.), 169.

Value of the ship being at first stated at 3000*l.*, the salvors took out a commission of appraisal, when it was valued at 2800*l.* It does not, therefore, follow, that the tender of 175*l.* must *ex necessitate* be insufficient. For the question is not, what the owners *then* deemed adequate, but what the Court *now* thinks adequate compensation. *Id.*

8. A schooner, considerably damaged, her master being also confined to his bed ill, was towed by a brig for fifteen or sixteen days, a distance of nearly 1000 miles. The property salvaged being about 3800*l.*, the Court awarded 800*l.* *The "Harriet"* (Court of Adm.), 180.

9. Proctors are not justified in entering actions and requiring bail to an amount quite disproportionate to the service. *The "Earl Grey"* (Court of Adm.), 180.

10. A Dutch ship, valued, with her cargo, at 13,400*l.*, having struck on the Goodwin Sands, but got off into deep water with the loss of her rudder and other damage, was taken by two luggers to the North Foreland, where steamers were engaged to tow her to Sheerness; fourteen of the luggers' crew remaining on board to pump her. The Court awarded 400*l.* besides the hire of the steamers. *The "Jan Hendrik"* (Court of Adm.), 181.

An agreement once made must be adhered to, whatever may be the consequent disadvantage to

either party; but a proposal made by one party and rejected by the other, cannot influence the judgment of the Court, which must be guided solely by the evidence. *Id.*

11. The Court will not receive as evidence the affidavits of persons, professing to be skilled in nautical affairs, as to ~~their~~ *their* opinion upon any case. *The "No"* (Court of Adm.), 184.

12. When smackmen are employed in a salvage service, the owners of the smacks have a right to sue for remuneration for the detention, even when the service is not dangerous. *The "Norden"* (Court of Adm.), 185.

13. A vessel having taken fire from spontaneous combustion of the cargo, came to anchor, in a calm, about eight miles off Monte Video. At the request of her master, the commander of a government steam-tug went to her assistance, and towed her to the harbour, at the entrance of which, however, both vessels grounded on a rock. She was got off by other assistance, and was then unladen by the crew of the steam-tug. The service continued about twenty days. Defence set up that, by the heedlessness of the salvors, the vessel grounded and suffered more harm than their services did good, not sustained. On the value of 8800*l.*, the Court awarded 750*l.* *The "Rosalia"* (Court of Adm.), 188.

It is advantageous to the Mercantile Marine that her Majesty's officers should be allowed to obtain reward for salvage services. *Id.*

No claim can be made for the services of a vessel belonging to the Government. *Id.*

14. A valuable vessel having got upon the Church Rocks, off Folkestone, received assistance from some small boats, which were unable to get her off. A tug steamer having also tried in vain to tow her off, a large passenger steamer was sent from Folkestone Harbour, and succeeded in moving her from the rocks, and towing her for a few minutes, when the hawser having broken, she drifted ashore, and became a wreck. The cargo was saved to the value of 9657*l.* The defence that no salvage reward was due, as the service had been unsuccessful, not sustained. Award of 450*l.* to the smaller vessels, and 250*l.* to the steamer. *The "Scutipore"* (Court of Adm.), 231.

15. The master of a brig, which had suffered considerable damage, without mentioning this fact, agreed with the master of a steam-tug for ordinary towage to London for 40*l.* During the service the master of the tug discovered the fact of such previous damage, repudiated the agreement, and brought a suit for salvage.—*Held*, 1st, that additional salvage cannot be engrafted on an agreement for extraordinary, though it may upon one for ordinary, towage. 2nd, that the mere concealment of a fact which might operate on the service and therefore on the agreement, vitiates it. 3rd, that in this case the facts concealed might operate on the service by rendering it longer and more arduous, and that the agreement was invalid. 150*l.* awarded. *The "King-alock"* (Court of Adm.), 263.

16. Pilotage service in a place where there are no licensed pilots. A service which would be pilotage in the case of a duly licensed pilot becomes salvage, as regards the reward, when voluntarily performed by others. *The "Rose-haugh"* (Court of Adm.), 267.

17. Where the value of the property saved was 2320*l.*, the Court, under the circumstances,

and considering the case one of great merit, awarded the salvors the sum of 600*l*. *The "Minerva"* (Court of Adm.), 271.

18. A steamer bound from the East to Southampton, meets another, disabled in her machinery, in the Bay of Biscay, and tows her to Plymouth Sound. The service lasted about forty-eight hours, and the value of the property salvaged was 4060*l*. A tender of 800*l*. was upheld, and the salvors condemned in costs. *The "Paris"* (Court of Adm.), 289.

19. An agreement for the services of a steamer to assist a vessel which was aground having been made, and the services completed under that agreement, it was subsequently cancelled by the mutual consent of the masters of the two vessels. The owners cannot set up such agreement as a bar to a suit for salvage. *The "Africa"* (Court of Adm.), 299.

In foreign countries, where the custom prevails of rendering mutual assistance without claiming salvage reward, steamers would not be bound by the custom as regards sailing-vessels, there being no mutuality between them. *Id*.

SCOTTISH LAW.

See *Administration*, 2.

SEAMEN.

Declarations of. See *Evidence*.

SHIPPING.

See *Bottomry Bond*.

See *Pleading*, 1.

Collision.

Prize of War.

Evidence.

Salvage.

Jurisdiction.

Standing Interrogatories, App. xiii.

Piracy.

1. A steamer in charge of a duly licensed pilot proceeding up the river caused such a swell that a barge, laden with coals, was thereby sunk: *Held*, that the steamer was to blame, for she ought to have seen the swell and the barge, and to have stopped in time to avoid the accident; and that, though the pilot was to blame for not checking or stopping the steamer, yet that the owners were liable, because it appeared in evidence that neither the swell nor the barge was seen from the steamer, and that, therefore, there was not a good look-out. *The "Batavier"* (Court of Adm.), 378.

2. A ship belonging to a British owner at Liverpool, having been taken by alleged pirates, and recaptured by one of her Majesty's ships of war, after her master had been killed, was placed in charge of a master of the royal navy to bring to Liverpool. Having suffered considerable damage, he put into the island of Fayal, and petitioned the director of the customs for an official survey. Three were made. The report was to the effect, that the ship could be repaired for about 300*l*. The master being dissatisfied, obtained a private survey, which resulted in a report that the ship was unseaworthy, and should be condemned. The director of the customs then, on the petition of the master, decreed the sale of the ship by public auction, and gave official notice thereof, according to the custom of the place. She was purchased by a Portuguese merchant, who immediately repaired her and sent her with a cargo to Bristol, where she was arrested by the original owner in a cause of possession.—*Held*, 1. The master had the authority of an ordinary master, and no more. 2. The validity of the sale must be tried by the law

maritime. 3. By the law maritime, as well as by the law of England, the sale of a ship by a master, though *bond fide*, can be justified only by urgent necessity. 4. With respect to ships, the *lex loci contractus* cannot prevail if opposed to the law maritime. 5. The circumstances of the case do not show an urgent necessity for the sale; and 6. The sale was invalid, and the ship must be restored to the original owner, with costs. "*Segredo*," otherwise "*Eliza Cornish*" (Court of Adm.), 36.

3. The master's lien on a vessel, when the owner is bankrupt, is limited to services in that vessel. A balance due from the owner to the master for services in another vessel disallowed. *The "Julindur"* (Court of Adm.), 71.

The Court, in the exercise of its equitable jurisdiction, may give a party the opportunity of further proof. *Id*.

The master allowed, at the risk of costs, to examine the bankrupt before the Court to prove the items for which vouchers were wanting. *Id*.

Balance of account for a former voyage in the same ship might be allowed; but in a different ship, it cannot. *Id*.

Bills, for which nothing has been actually paid by the master, though the liability remain, cannot be allowed as payment in the master's accounts. *Id*.

4. A vessel of 845 tons, with a regular crew of thirty hands, and ten extra, sailed with emigrants to Geelong, in Australia. On arriving, the master proposed to the crew to proceed to the diggings, under certain arrangements for division of profits between the owners and the crew. The master went with them, and after some time found the men deserting; and therefore proposed the immediate return to the ship. Only fifteen returned; extra hands could be engaged only at an exorbitant rate. The master, therefore, proposed that if the crew would take the ship, *ex short-handed*, to Bombay, he would divide the amount of wages due to those who had deserted among those who remained; they assented, and each received his proportion; the vessel arrived in safety at Bombay, where the crew was completed. On arriving at Liverpool the owners deducted, as wages advanced, the sum paid to each out of such forfeited wages.—*Held*, 1. That a contract for reward beyond the wages under the mariners' contract is illegal and void. 2. That a payment made by the master under such contract is illegal, and might be recovered at law by the owner. 3. That instead of driving the owner to law for his remedy, the Court of Admiralty should give it him by allowing the deductions. *The "Araminta"* (Court of Adm.), 224.

SHIP REGISTRY ACT.

Transfer of shares by sale at auction not legally completed as required by the Registry Act, though the purchaser had paid a large sum of money. Vendors proceeding against the purchaser, in a cause of possession, not allowed their costs. *The "Virtue"* (Court of Adm.), 77.

SIGNATURE.

See *Probate*, 1.

Acknowledgment of, instead of signing. See *Attestation*.

SIMULATED PAPERS.

See *Prize of War*, 5.

SMACKSMEN.*See Salvage, 12.***SOLDIER.***See Probate, 6.***SPECIAL PROBATE.***See Probate, 4.***STANDING INTERROGATORIES.***See Appendix, xiii.*How Answers to be taken. *See Prize of War, 7.***STATUTES.**Construction of 14 & 15 Vict. c. 79. s. 27. *See Collision, 8.*How construed. *See Piracy, 1.*What are Necessary within the Meaning of Stat. 3 & 4 Vict. c. 65. s. 6. *See Jurisdiction.***STEAM-VESSELS.***See Collision, 1. See Salvage, 14.*Causing Swell in River. *See Shipping, 1.*Not affected by Custom of Foreign Countries. *See Salvage, 19.***SUBTRACTION OF WAGES.***See Shipping, 4.***SURETIES.**Delivery out of Bond for Purpose of Suit against. *See Bond.***TAXATION OF COSTS.**

In a matrimonial suit, the husband retained *one* counsel only, and the wife's proctor, conceiving she could not claim the privilege of *two*, also retained *one* only, but for the hearing was induced to retain a second. The costs thereof being allowed upon taxation, the proctor for the husband objected to the Registrar's report. — *Held*, that the ordinary practice of the Court was to have two counsel on each side; that a wife was *prima facie* therefore entitled thereto; and that the special circumstances of the present case did not afford sufficient ground for exception. *Money v. Money* (Archers), 117.

The wife is not to be barred of her right to two counsel by reason of what has passed between the two proctors out of Court. *Id.*

TENDER.Costs where insufficient. *See Salvage, 7.***TESTIMONIUM CLAUSE.***See Probate, 1.***TOWAGE.**As distinct from Salvage. *See Salvage, 2.*Ordinary — Extraordinary. *See Salvage, 15.***TRINITY MASTERS.**Abandonment of injured Vessel not a Question for. *See Collision, 11.*When Court will not adopt their Advice. *See Evidence.***WILL.****UNATTESTED PAPER.***See Probate, 3.***UNPUBLISHED DEPOSITIONS.***See Practice, 1.***VERDICT AT LAW.***See Collision, 8.***WAGES.**Subtraction of. *See Shipping, 4.***WILL.***See Administration.**Alterations and Interlineations.**Attestation.**Probate.**Revocation.*Delivery out of. *See Practice, 2.*

1. An Austrian subject in Milan, by a legal will in which no executor was appointed, made C. M., spinster, universal legatee. C. M. was duly put in possession of the estate of the deceased, by authorities at Milan, and afterwards duly executed, according to the law of Milan, an irrevocable deed of gift of all her estate in favour of Madame R. C., and shortly afterwards died intestate. Madame R. C. was duly put in possession of the estate in Milan. It being afterwards discovered that the testator was entitled to 1000*l.* under some proceedings in Chancery in England, and application being made to this Court, it decreed letters of administration, with the will annexed, limited to the estate taken under the deed of gift, to Madame R. C., the donee, upon an affidavit of the Austrian consul, verifying the documents produced, being left in the registry. *In the Goods of Vincenzo Frederici, deceased* (Consol.), 109.

2. The will of an eccentric person, strongly imbued with Eastern notions, and attached to Eastern customs, in which money was left for the erection in Constantinople of a cenotaph, with a light burning therein, and with the name and description of the testator engraved thereon, and in which the residue was left to the poor of Constantinople, — *Held*, in the Prerogative Court, partly from its sounding to folly, and partly from the evidence of the drawer and one of the attesting witnesses, to be invalid; but pronounced by the Court of Appeal, reversing the judgment of the Court below, to be the act of a capable testator, and, therefore, valid. *Austen v. Graham* (P. C.), 357.

It is necessary to inquire into the previous habits and opinions of the deceased; for conduct which would be absurd and irrational in one living according to English habits and believing in Christianity, would not be so in a native of India, or in one who had adopted its modes of life and believed in Mahometanism. *Id.*

END OF THE FIRST VOLUME.





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